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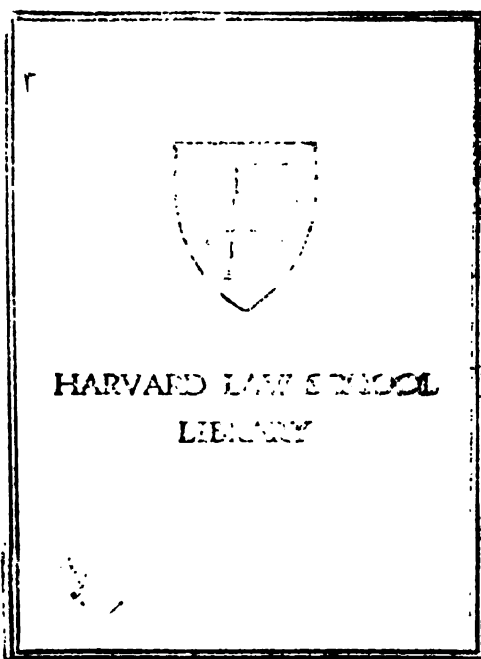
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REPORTS

OF

Cases in Law and Equity

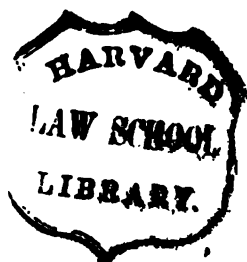
IN THE

S U P R E M E C O U R T

OF THE

STATE OF NEW-YORK.

BY OLIVER L. BARBOUR,
Counsellor at Law.



VOL. V.

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CASES

REPORTED IN THIS VOLUME.

A		D	
Allen, Beecher v.....	169	Dean, Bailey v.....	297
Arnold v. Gilbert.....	190	Deifendorff, Elwood v.....	398
Artcher v. McDuffie.....	147	Dole v. Gold.....	490
		Duffy, People v.....	205
B		E	
Babcock, Jarvis v.....	139	Edgerton, McDonald v.....	560
Bailey v. Dean.....	297	Ehle, Quackenbush v.....	469
Bander v. Snyder.....	63	Elmendorf, Lawrence v.....	73
Barnard, Pierrepont v.....	364	Elwood v. Deifendorff.....	398
Barnes v. Matteson.....	375		
——, Payne v.....	465		
Battle v. The Rochester City Bank,	414		
Beardslee v. Beardslee.....	324		
Beecher v. Allen.....	169		
Blatchford, Leavitt v.....	9		
Blowers, Jemison v.....	686		
Bort v. Smith.....	283		
Bradford v. Corey.....	461		
Brice v. Brice.....	533		
Brown v. Woodworth.....	550		
Bucklin v. Ford.....	393		
Burt v. Horner.....	501		
Bush v. Pettibone.....	273		
Bushnell, Pillow v.....	156		
C		F	
Camp v. Pulver.....	91	Fairchild, Mann v.....	108
Carpenter, Hubbell v.....	520	Farmers' Loan and Trust Co. v.	
Carroll, The Farmers' Loan and		Carroll.....	613
Trust Co. v.....	613	First Baptist Church in Schenec-	
Clarke v. Cummings.....	339	tady v. The Schenectady and	
Clayton v. Wardell.....	214	Troy Rail-Road Co.....	79
Corey, Bradford v.....	461	Floyd, Morris v.....	130
Crafts v. Mott.....	305	Flynn v. Stoughton.....	115
Crowell, Frith v.....	209	Ford, Bucklin v.....	393
Cruget v. Cruget.....	225	Frink v. Green.....	455
Cummings, Clarke v.....	339	Frith v. Crowell.....	209
Cutter, Spear v.....	486		
		G	
		Gilbert, Arnold v.....	190
		Gillet v. Moody.....	185
		Gold, Dole v.....	490
		Grant v. Johnson.....	161
		Green, Frink v.....	455
		H	
		Halstead v. The Mayor, &c. of	
		New-York.....	218

Harris v. Palmer,.....	105
Hitchins, Warner v.....	666
Horner, Burt v.....	501
Hosford v. Merwin,.....	51
Houghtaling v. Houghtaling,.....	379
Hovey, People v.....	117
Hubbell v. Carpenter,.....	590
Wood v.....	601
Hutchinson, Williams v.....	122

I

Ingersoll v. Jones,.....	661
--------------------------	-----

J

Jacks v. Nichols,.....	38
Jarvis v. Babcock,.....	139
Jemison v. Blowers,.....	686
Johnson, Grant v.....	161
Jones, Ingersoll v.....	661
Judson, Worrall v.....	210

L

Lawrence v. Elmendorf,.....	73
Leavitt v. Blatchford,.....	9
Leggett, Poople v.....	360
Lewis, McKnight v.....	681

M

McDonald v. Edgerton,.....	560
McDuffie, Artcher v.....	147
McIntyre, Proseus v.....	424
McKnight v. Lewis,.....	681
McMartin, Stewart v.....	438
Mann v. Fairchild,.....	108
Matteson, Barnes v.....	375
Mayor, &c. of N. York, Halstead v. People v.....	218 43
Merwin, Hosford v.....	51
Miller v. People,.....	203
Millis, People v.....	511
Moody, Gillet v.....	185
Moers, Van Allen v.....	110
Morris v. Floyd,.....	130
Morse v. Stone,.....	516
Mosher v. People,.....	575
Mott, Crafts v.....	305
Moulton v. Norton,.....	286
Moyer v. Shoemaker,.....	319

N

Nash v. Russell,.....	556
Neilson v. Neilson,.....	565
Nichols, Jacks v.....	38
Norton, Moulton v.....	286

P

Palmer, Harris v.....	105
Payne v. Barnes,.....	466
People v. Duffy,.....	205
People v. Hovey,.....	117
People v. Leggett,.....	360
People v. Mayor, &c. of New-York,.....	43
People v. Miller,.....	203
People v. Millis,.....	511
People v. Mosher,.....	575
People v. Rowland,.....	449
People v. Schuyler,.....	166
Perine, Rockwell v.....	573
Pettibone, Bush v.....	273
Pierrepont v. Barnard,.....	364
Pillow v. Bushnell,.....	156
Proseus v. McIntyre,.....	424
Prosser v. Secor,.....	607
Pulver, Camp v.....	91

Q

Quackenbush v. Ehle,.....	469
---------------------------	-----

R

Richardson, Rowe v.....	385
Rochester City Bank, Battle v.....	414
Rockwell v. Perine,.....	573
Rowe v. Richardson,.....	385
Rowland, People v.....	449
Russell, Nash v.....	556

S

Schenectady and Troy Rail-Road Company, First Baptist Church in Schenectady v.....	79
Schroeppe v. Shaw,.....	580
Schuyler, People v.....	166
Secor, Prosser v.....	607
Shaw, Schroeppe v.....	580
Shoemaker, Moyer v.....	319
Sholl v. Sholl,.....	312
Smith, Bort v.....	283
Snyder, Bander v.....	63
Spear v. Cutter,.....	486
Spencer v. The Utica and Schenectady Rail-Road Co.,.....	337
Stewart v. McMartin,.....	438
Stone, Morse v.....	516
Stoughton, Flynn v.....	115

T

Tallman v. Varick,.....	277
Tucker v. Tucker,.....	99

CASES REPORTED.

vii

U		W
Utica and Schenectady Rail-Road Company, Spencer v.....	337	Wardell, Clayton v..... 214 Warner v. Hitchens,..... 666 White v. White,..... 474 Williams v. Hutchinson,..... 123 Wood v. Hubbell,..... 601 Woodworth, Brown v..... 550 Worrall v. Judson,..... 210
V		
Van Allen v. Mooers,.....	110	
Varick, Tallman v.....	277	

CASES
IN
Law and Equity
IN THE
SUPREME COURT
OF THE
STATE OF NEW-YORK.

NEW-YORK GENERAL TERM, November, 1848. *Hurlbut,
McCoun, and Edwards, Justices.*

LEAVITT, receiver of the North American Trust and Banking
Company, *vs.* BLATCHFORD and others.

Banking associations, organized under the act to authorize the business of banking, passed April 18, 1838, are corporations ; and the general laws relating to moneyed corporations apply to associations of that nature.

Accordingly *held* that the provisions of the revised statutes prohibiting the directors of a moneyed corporation from applying any portion of the funds of their corporation, except surplus profits, to the purchase of shares of its own stock, and declaring that no conveyance, assignment or transfer, nor any payment made, judgment suffered, lien created, or security given by any such corporation when insolvent or in contemplation of insolvency, with the intent to give a preference to any particular creditor, shall be valid, are applicable to associations under the general banking law.

Although it is a fundamental rule that every law must be construed according to the intention of the makers, that intention is never resorted to for any other purpose than to ascertain what they in fact intended *to do*, and not for the purpose of ascertaining what they *have done*. *Per* EDWARDS, J.

Where a contract grows immediately out of, and is connected with, an illegal or immoral act, it cannot be enforced. But if the promise is entirely disconnected

Leavitt v. Blatchford.

with the illegal act, and is founded on a new consideration, it is not affected by the illegality of the act, although it was known to the party to whom the promise was made.

A promise made in consideration of a loan to enable the borrower to pay an illegal debt, does not arise out of an illegal transaction, and is not connected with it; and the maxim *ex turpi causa non oritur actio* does not apply; unless the statute makes the payment of such debt illegal.

Although the general banking law gives no power to banking associations, in express terms, to borrow money, yet as such an association may become indebted in the exercise of its undoubted legitimate business, it has, as a necessary incident, the power to borrow money for the purpose of paying its debts.

It is a general fundamental principle that when a right is given, all powers necessary to the exercise and enjoyment of the right are also given.

A banking association is liable for the payment of money borrowed for its use, upon a letter of credit signed by the president in pursuance of a resolution passed by the proper committee of the board of directors, although there is no written contract for repayment signed by the president or vice president, and cashier.

Under the articles of association and by-laws of the North American Trust and Banking Company the committee of the board of directors, on investments and finance, had the power to authorize the execution of an agreement and trust deed, by the president and cashier of the company, to secure the repayment of a loan made to the company.

Under the provisions of the act of May 14, 1840, declaring that no banking association shall issue or put in circulation, any bill or note of such association, unless the same shall be payable on demand without interest, promissory notes given by a banking association, payable after date, are illegal and void; even though they were not intended to circulate, and are incapable of circulating, as money.

Although notes of a banking association, thus issued, are void, yet the original indebtedness, of which they are the evidences, remains; and a deed assigning property in trust, as collateral security for the payment of the debt, is valid.

It is a well settled principle of law that if there are different and distinct undertakings in the same contract, some of which are legal and some illegal, the law will sustain the good, and make void only the bad. *Per* EDWARDS, J.

Where there is a security given for the payment of a debt, although the security may be illegal and void, yet if in the same instrument there is a contract to pay the debt, the contract may be enforced. *Per* EDWARDS, J.

IN EQUITY. The bill in this cause was filed for the purpose of having certain promissory notes purporting to be made by the North American Trust and Banking Company, and payable to the defendants Palmers, Mackillop, Dent & Co., in London, one year after date, set aside and declared void; and to set aside a deed assigning to the defendants Blatchford and

Leavitt v. Blatchford.

Murray, certain securities in trust, to secure the payment of the promissory notes. The facts are stated in the opinion of the court.

G. N. Titus & Geo. Wood, for the plaintiff.

Wm. Kent & C. O'Connor, for the defendants.

By the Court, EDWARDS, J. The receiver of the North American Trust and Banking Company asks the aid of this court, sitting in equity, to set aside and declare void forty-eight promissory notes, made in the name of the company, and signed by its president and cashier, in the sum of £1000 each, with interest, payable twelve months after date; and also to set aside an agreement, or trust deed, executed under the seal of the company, and signed by its president and cashier, whereby the company assigned certain stocks, bonds and mortgages in trust to secure the promissory notes. The ground on which the plaintiff claims relief is, that the notes and deed were made and executed in violation of the laws of this state, and are void. The statutes on which he mainly relies are applicable to moneyed corporations only. The first question then to be considered is, whether the North American Trust and Banking Company, being an association organized under the act to authorize the business of banking, passed April 18, 1838, was a corporation, within the letter and spirit of the statutory provisions referred to.

The numerous decisions which have been made in reference to banking associations have established, beyond a doubt, that the company in question was a corporation. (*Warner v. Beers*, 23 Wend. 103. *The People v. The Assessors of Watertown*, 1 Hill, 616. *The Supervisors of Niagara v. The People*, 7 Id. 504. *Gifford v. Livingston*, 2 Denio, 380.) This was not disputed on the argument. But it was contended that it was not a corporation, in every acceptance of the term, and within the spirit and meaning of all the general laws applicable to moneyed corporations.

In the case of *Warner v. Beers*, which was the first adjudi-

Leavitt v. Blatchford.

cated case on the subject, it was held, and the same doctrine was reaffirmed in the case of *Gifford v. Livingston*, that banking associations under the act of 1838, although corporations, were not such within the constitutional provision requiring the assent of two-thirds of each branch of the legislature to the creating any body politic or corporate. The reason given for the decision was, that the general banking law did not secure exclusive privileges to any particular class of citizens, which might not be enjoyed in the same manner by all others. In other words, that banking associations were not monopolies—and that it was to institutions of that character that the constitutional restriction was intended to apply. This decision establishes the principle that banking associations are not corporations within the meaning of the fundamental law of the state. The question then arises whether they are such within the meaning of its general statutory laws.

The acts which are invoked by the plaintiff, in support of his claim to the relief sought, are first that which declares that “it shall not be lawful for the directors of any moneyed corporation to apply any portion of the funds of their corporation, except surplus profits, directly or indirectly, to the purchase of shares of its own stock.” (1 R. S. 589, § 1, *sub. 5*, 1st ed.) And second that which declares that “no conveyance, assignment or transfer, nor any payment made, judgment suffered, lien created or security given by any such corporation when insolvent or in contemplation of insolvency, with the intent to give a preference to any particular creditor over other creditors of the company, shall be valid in law.” (1 R. S. 791, § 9, 1st ed.)

These statutes were passed before the act of 1838, and it is contended on the part of the defendants that they do not apply to corporations organized under that act, because, in the first place, the legislature, at the time of the passage of the general banking law, intended to create a legal existence which would not be a corporation, and believed that it had done so—and that therefore it could not have intended that the general laws applicable to moneyed corporations should apply to banking associations; and in the second place, because there are some pro-

Leavitt v. Blatchford.

visions contained in the act of 1838, applicable to subjects similar to those provided for in the general laws in reference to moneyed corporations, and that upon the principle that *expressio unius est exclusio alterius*, the correct legal inference is, that all the other provisions, not embraced in the act of 1838, were not intended to apply to associations under that act.

In reference to the first ground, although it is a fundamental rule that every law must be construed according to the intention of the makers, still that intention is never resorted to for any farther purpose than to ascertain what they in fact intended *to do*, and not for the purpose of ascertaining what they *have done*; or, to apply the principle to this case, we must look to the intention of the legislature to ascertain what powers have been given to banking associations by the general banking law. But the intention of the legislature cannot govern in ascertaining what shall be the legal effect of such powers; neither is it to be resorted to for the purpose of ascertaining what is the proper legal name and description of an association possessing the powers granted. When the question was before the court for the correction of errors, there was no doubt as to the extent of the powers possessed by banking associations: the only question was as to which class of legal existences bodies with such powers properly belonged. The court decided that they were corporations; that is, that the thing which the legislature intended to create, and did create, was, according to the correct legal construction, a corporation. Now, the legislature which passed the general laws in reference to moneyed corporations intended that they should apply to all associations which came within that description. The legislature that passed the act of 1838 did not, by any provision in that act, exclude associations created under it from the operation of the general laws. It was intended then that those laws should be applicable to banking associations, if, according to correct legal interpretation, they come within the meaning of moneyed corporations.

As to the second ground taken by the defendants, there is no doubt that the general principles stated are correct; but in

Leavitt v. Blatchford.

order to bring the case within those principles, it must appear that the provisions contained in the act of 1838 are so far inconsistent with the provisions of the general law, that there is a clear intention to exclude banking associations from its operation. There is nothing in the act of 1838 which is either expressly or by implication inconsistent with the general law in reference to assignments by moneyed corporations. The principle laid down, then, does not apply to the provision of the statute on that subject ; but it is contended that the section of the general law which forbids the purchase of shares of its own stock, by a moneyed corporation, was intended to be superseded by the provisions of the act of 1838, which declares that "if any portion of the original capital of any banking association shall be withdrawn, for any purpose whatever, while any debts of the association remain unsatisfied, no dividends or profits on the shares of the capital stock of the association shall thereafter be made until the deficit of capital shall be made good ; and if it shall appear that any such dividends have been made, it shall be the duty of the chancellor to make the necessary orders and decrees for closing the affairs of the association." (*Laws of 1838, p. 252, § 28.*) This provision is not inconsistent with the section above cited from the general law, which prohibits the purchase of shares of its own stock by a moneyed corporation ; on the contrary, it is not strictly in reference to the same subject matter, and it seems to have been intended to provide against a mischief of a different character. One law was intended to prevent the purchase by a moneyed corporation of shares of its own stock, except from its surplus funds—the other was intended to prevent a dividend by a banking association after any portion of its capital stock should be withdrawn, and while any of the debts of the association remained unsatisfied.

But to remove all doubt upon the subject, it seems to me that it is now settled by authority, that the general laws in reference to moneyed corporations must apply to banking associations. In the case of *Warner v. Beers*, it is true that it was held that banking associations were not corporations, within the spirit

Leavitt v. Blatchford.

and meaning of the constitution. But in all other respects, when the question has arisen, they have been held to be corporations. In the case of *The People v. The Assessors of the village of Watertown*, it was decided by the supreme court that they were moneyed corporations within the meaning of the statute which declares that moneyed corporations deriving an income from the capital, or otherwise, shall be liable to taxation. (1 R. S. 414, § 1, 1st ed.) In the case of *The Supervisors of Niagara v. The People*, a similar doctrine was laid down by the court for the correction of errors. In the matter of *the Bank of Dansville*, (6 Hill, 370,) in which an application was made for the summary interference of the court to set aside an election of directors by a banking association, the court also held that generally the laws in reference to moneyed corporations applied to banking associations, although they held that, in that case, the general law in reference to the election of officers of moneyed corporations (1 R. S. 598, § 47 to § 50) could not be made applicable to banking associations, owing to the peculiar character of their organization. It follows, then, as a conclusion, that both upon principle and authority, the statutes which have been referred to in relation to moneyed corporations, and which are relied upon by the plaintiff as one of the grounds on which he claims the aid of this court, are applicable to associations under the general banking law.

The next question which arises is, whether the promissory notes and trust deed were founded on a legal valid consideration. It is contended on the part of the plaintiff that the money lent by Palmers, Mackillop, Dent & Co. to the North American Trust and Banking Company, and which formed the consideration of the instruments in question, was used by the company for the purpose of purchasing shares of its own stock, in violation of the provisions of the statute above cited; and that Palmers, Mackillop, Dent & Co., at the time of the loan, knew of the purpose to which the money was to be applied. I shall assume in the first place, in compliance with the views that have already been expressed, that if such a purchase of stock as is alleged, was made by the company in any other

Leavitt v. Blatchford.

manner than out of its surplus funds, the act was illegal—and I shall farther assume that the plaintiff in this suit, who represents the creditors of the association, has the right to set up such illegality.

There are two questions then to be considered. 1. Whether the money lent was used as is alleged; and, 2. Whether the loan was made with knowledge, on the part of the lenders, of the uses and purposes to which the money was to be applied. As these are questions of fact, it will be necessary to inquire into the circumstances connected with the loan, and to consider the manner in which it was made.

It appears from the proofs that, shortly after the organization of the North American Trust and Banking Company, Shaw, a London banker, was in the city of New-York attending to the business of the house of which he was a member. It farther appears that, while here he addressed a letter to Palmers, Mackillop, Dent & Co., at London, in which, after representing with great earnestness the valuable services which he supposed would be rendered by the North American Trust and Banking Company in assisting the suspended houses, and in alleviating the commercial distress of the country, he introduces the company to the confidence of his London friends and correspondents. Upon this introduction, a business intercourse between the parties commenced. At the time when the banking company had completed its organization, it was supposed that by the sale of its own stock it could place itself in a condition to carry on the banking operations for which it had been formed. In this expectation it was disappointed; and in order to meet its liabilities, it sent state stocks, which it had purchased to a very large amount, to England, for sale. Palmers, Mackillop, Dent & Co., were the bankers through whom a portion of these stocks were sold, and who were also employed by the company in other transactions connected with its foreign business. These relations continued until about the fourth day of April, 1840, when bills of exchange to the amount of £33,500, drawn upon Palmers, Mackillop, Dent & Co., were presented to them for acceptance. These bills had no connection with

Leavitt v. Blatchford.

any previous transactions between the parties. They were not drawn upon any funds which the banking company had in the hands of the drawees, nor upon any existing credits, and owing to accidental causes, they were not accompanied with any letter of explanation. Under these circumstances, acceptance of the bills was refused, and they were noted for non-acceptance. On the 6th of April, in the same year, a letter was received from Beers, the president of the banking company, bearing date the 2d of March, 1840, in which he stated that the company had authorized a credit in favor of Thos. E. Davis, for £16,875, the bills to be drawn at ninety days' sight, and to be renewed in case certain bonds in the hands of Palmers, Mackillop, Dent & Co. should not have been previously cashed. The letter speaks in high terms of the wealth, respectability and prudence of Davis, and refers to their "mutual friend" Fletcher Wilson, for an explanation of the motives which had induced the company to grant the credit, and of the advantages which might be expected to accrue from it. Upon the strength of this letter and of representations which were made to Palmers, Mackillop, Dent & Co., by a friend in London, as to the wealth of Davis, they resolved to accept the bills, and afterward did so, and finally, after two renewals, paid them in full. It is alleged, on the part of the plaintiff, that these bills were drawn for the purpose of enabling the company to purchase five thousand shares of its own stock; and it is also alleged that this fact was known to the drawees at the time of their acceptance of the bills. The first question to be considered is whether the bills were drawn and accepted for the purpose and in the manner alleged.

It appears by the testimony of Strong, who was one of the directors of the company, and who is the principal witness on the part of the plaintiff, that on the 28th of February, 1840, the company purchased five thousand shares of its own stock. It farther appears that, in order to make such purchase, two sets of bills were drawn; the first set upon Palmers, Mackillop, Dent & Co., in favor of Huth & Co., and other bankers in England; and the second set upon Huth & Co. and the other

Leavitt v. Blatchford.

houses in whose favor the first set of bills had been drawn; the second set of bills having been drawn against the anticipated acceptances of the first. The second set of bills was sold in the city of New-York, and it was with the proceeds of such sale that the stock in question was purchased. It appears, then, that the stock was not purchased by the bills drawn on Palmers, Mackillop, Dent & Co., but that it was purchased with the proceeds of other bills; and that the whole transaction had been completed not only before Palmers, Mackillop, Dent & Co. knew of it, and before the bills drawn upon them were accepted, but before they had been sent from this country. It was contended, however, on the part of the plaintiff, that although Palmers, Mackillop, Dent & Co. had no knowledge of the purchase before it was completed—still that Fletcher Wilson was their agent, and that he had notice of the intended stock transaction at the time when the bills were drawn, and sanctioned it as such agent.

The first inquiry here is, whether Wilson was the agent of Palmers, Mackillop, Dent & Co. It seems to me that the proof shows beyond a doubt that he was not. The answer of Palmers, Mackillop, Dent & Co., which, in this respect, is responsive to the bill, unequivocally and positively denies such agency. There is no evidence that he was expressly authorized to act as agent, or that he was expressly acknowledged as such. Neither does the testimony of Strong or Davis, the two witnesses who are relied on for this purpose, show any act from which the agency of Wilson can be implied. It is evident, too, that the company did not consider him an authorized agent. They never treated him, in the transactions, as if they so regarded him. The letter of Beers does not pretend that Wilson had authorized, or that he had any right to authorize, the drawing of the bills of exchange to which the letter alludes. He is spoken of as "our mutual friend," to whom Beers refers for explanations which he thinks will satisfy the drawees of the bills. Palmers, Mackillop, Dent & Co. cannot then be charged with knowledge of the facts which were known by Wilson. Such being the case, the firm of Palmers, Mackillop, Dent &

Leavitt v. Blatchford.

o. had no knowledge of the stock purchase, either actual or constructive, till after the presentment of the bills of exchange on them in London for acceptance.

The question then arises, how soon after such presentment they received notice. The letter of Beers was received on the 14th of April. In that letter no actual notice was given; but it was contended that the reference which it makes to Wilson was of such a character as to put the drawees of the bills on their inquiry, and operated as constructive notice to them. It is not necessary to examine as to how far the rule in reference to constructive notice extends. For, if we adopt the rule laid down by the counsel for the plaintiff, that whatever is calculated to create a suspicion as to the legality of a transaction, is constructive notice of the nature of such transaction, still there could be nothing in this case to charge the drawees with constructive notice. The reference to Wilson was calculated rather to allay than excite suspicion. And it certainly could never have been supposed by Palmers, Mackillop, Dent & Co., when they were referred to the mutual friend of the parties for an explanation, which the letter evidently implies would prove satisfactory, that, on inquiry of their friend, it would be disclosed to them that the transaction was illegal. The same remarks are applicable to the letter of Davis.

If I am correct in these views, it follows that the first notice of the stock purchase which Palmers, Mackillop, Dent & Co. received, was that which was contained in the letter delivered by Murray to Palmer on the evening of the 7th of April. It becomes important here to ascertain what was the situation of the bills of exchange at that time. In the answer of Palmer, which, in this respect, is responsive, he says that the bills which had been presented, amounting in the aggregate to £33,500, had been accepted or agreed to be accepted. It appears that £19,000 were held by Huth & Co.; that £3500 were held by Masterman & Co., and that £11,000 were held by Palmers, Mackillop, Dent & Co. It also appears by the testimony of Maitland, the clerk of Palmers, Mackillop, Dent & Co., that the bills in their hands were accepted and passed

Leavitt v. Blatchford.

to the credit of the company, in consequence of the receipt of the letter of Beers, although he does not distinctly state whether this was done before or after Palmer's interview with Murray; and Murray states in his testimony that in his interview with Palmer, the latter stated that on the receipt of the letter of credit, and on the assurance of his friend Melville Wilson, as to the responsibility of Davis, he had sent notice to Huth & Co., and to Masterman & Co., that Palmers, Mackillop, Dent & Co. had decided to accept the bills held by them. It appears, then, that as to upwards of £20,000 of the bills drawn on them, Palmers, Mackillop, Dent & Co. had given notice of their intended acceptance before the receipt of Fletcher Wilson's letter.

It will be remembered that by the law of England a verbal acceptance of a foreign bill of exchange is binding. (*Chitty on Bills*, 172.) But it was contended, on the argument, that inasmuch as the bills of exchange had not been delivered up to the holders, after notice of their intended acceptance, and as there had been no express assent to the acceptance on the part of the holders, it was revocable; and that Palmers, Mackillop, Dent & Co. were not bound by it. (*See Story on Bills*, 252.) It is undoubtedly true, as a general rule, that an acceptance of a bill, not communicated to the holders, is revocable before the bill is delivered up. But is the rule the same where the acceptance is communicated, even although there is no delivery of the accepted bill? In the case of *Cox v. Troy*, (5 *Barn. & Ald.* 474,) Bayley, J. says, "It is not the mere act of writing on the bill, but the making a communication of what is so written, that binds the acceptor; for the making the communication is a pledge by him to the party, and enables the holder to act upon it." Can it then be said, with certainty, that in case the holders of the bills had insisted on the notice which they had received as a binding acceptance, Palmers, Mackillop, Dent & Co. could have successfully resisted such a claim? To say the least of it, the case admitted of a question. The holders of the bills might have made arrangements in their business, founded upon the notice which they had received; and even if Palmers, Mackillop, Dent & Co. were not legally

Leavitt v. Blatchford.

liable, still a regard for their faith as merchants would have required them to fulfil the promise which they had made, and upon which others had depended.

As to the bills which had not been presented at the time of the receipt of Wilson's letter, Palmers, Mackillop, Dent & Co. were uncommitted. But the letter of credit was an entire contract, and it would have been questionable how far the parties to it would have been liable to Palmers, Mackillop, Dent & Co. in case they had honored but a part of the bills drawn under it. It might possibly be that if immediately on the receipt of Wilson's letter, Palmers, Mackillop, Dent & Co. had countermanded the notice of acceptance, they would have escaped all legal liability. But if, in the embarrassing situation in which they then stood, they were induced to keep the promise which they had made, and in order to remove all legal question, thought it expedient afterward to accept the other bills drawn against the entire credit, can it be said that a claim thus created arose *ex turpi causa*? Particularly, when upwards of a month had elapsed after the illegal transaction had been consummated. It seems to me that neither law, equity, nor morality would require such a conclusion.

The question has frequently arisen in England, as to how far a contract for the repayment of money advanced by one party to another, to enable him to pay an illegal debt, could be enforced. In the case of *Faikney v. Reynous*, (4 Burr. 2069,) two persons had been jointly engaged in stock-jobbing transactions, and one of them had advanced money on behalf of the other, for compounding differences. It was held by Lord Mansfield that a suit could be maintained upon a bond given for the payment of the money advanced, on the ground that there was a new consideration. In the case of *Petrie v. Hannay*, (3 T. R. 419,) which was a similar transaction, it was held that the party who had advanced the money could recover it back, it having been advanced for the benefit of the other party, and with his privity and consent, and he having, subsequently to the advance, made an express promise of payment. In the case of *Booth v. Hodgson*, (6 T. R. 403,) which

Leavitt v. Blatchford.

also arose out of a stock-jobbing transaction, it was held that one partner who had advanced money for the benefit of another could not recover it back on an implied assumpsit, and the court then stated that an action could not be sustained, because on the whole case no promise could be implied except that which arose out of an illegal contract. In the case of *Auburt v. Maze*, (2 Bos. & Pul. 371,) where one partner had advanced money for the benefit of another, in payment of losses on illegal insurances, it was held that no action would lie; and the soundness of the distinction taken in the case of *Petrie v. Hannay*, between an express and an implied promise, was doubted. It will be remembered that in all these cases the party who advanced the money had been *particeps criminis* in the original illegal transaction.

There is another class of cases in which actions have been sustained for money advanced to a person, to enable him to pay a debt which had been illegally contracted, but where the lender was not a party to the illegal transaction. In the case of *Robinson v. Bland*, (2 Burr. 1077,) money lent to pay a gaming debt was held recoverable. A similar decision was made in *Alcinbrook v. Hall*, (2 Wils. 309.) See also *Carson v. Ranbat*, (2 Bay, 560.) In the case of *Armstrong v. Toler*, (11 Wheat. 258,) the English cases were reviewed by Ch. J. Marshall, and the rule which he deduced from them is, that where a contract grows immediately out of, and is connected with, an illegal or immoral act, it cannot be enforced. But if the promise is entirely disconnected with the illegal act, and is founded on a new consideration, it is not affected by the illegality of the act, although it was known to the party to whom the promise was made. Thus if the party who advanced the money knew that it was to be paid in discharge of a debt not recoverable at law, still he could maintain an action for its recovery. The case of *Cannon v. Bryce*, (3 Barn. & Ald. 179,) does not conflict with this rule. In that case money was lent to enable a party to pay an illegal debt, and the court held that it could not be recovered back by the lender. The ground of that decision was, that in the case then before the court, the

Leavitt v. Blatchford.

statute made the act of payment illegal, and the loan was consequently for the purpose of enabling a party to do an illegal act. But where the statute does not make the payment itself illegal, a promise founded on a loan to pay an illegal debt does not arise out of an illegal transaction, and is not connected with it, and the maxim *ex turpi causa non oritur actio* does not apply.

But if it should be admitted that money lent to pay an illegal debt cannot be recovered, still I think that the claim of Palmers, Mackillop, Dent & Co. can be sustained; for as a question of fact, it seems to me that the loan made to the banking company was not only not made for the purpose of enabling it to purchase its own stock, but that it was not made for the purpose of enabling it to pay for stock already purchased. As has been before stated, it appears by the testimony of Strong, that the stock was purchased on the 28th of February, 1840, that it was paid for out of the proceeds of other bills than those drawn on Palmers, Mackillop, Dent & Co. before the bills drawn on them had been presented for acceptance. It must follow, then, that the bills were accepted, not to enable the company to pay an illegal debt, but to use the language of Murray, to save it from a "crisis in its affairs which would have compelled it to wind up." The officers of the company had placed it in such a situation, that the acceptance of the bills was necessary to prevent its prostration and ruin. It was in reference to this consideration, and for the purpose of avoiding a result which would have been so disastrous, that Palmers, Mackillop, Dent & Co. much against their wish, were forced to become the creditors of the company.

The next question to be considered, is, how far the North American Trust and Banking Company had the power to borrow money. The general banking law gives no such power in express terms. It specifies the general powers of banking associations, and then confers such incidental ones as shall be necessary to carry on their business under the powers specifically granted. Without reference to the banking law, it is a general fundamental principle, that when a right is given, all

Leavitt v. Blatchford.

powers are given which are necessary to the exercise and enjoyment of the right. Now, it cannot be questioned that a banking association may become indebted, in the exercise of its undoubted legitimate business. It has the right to receive deposits, and it must become indebted for them. It has the right to purchase gold and silver bullion, foreign coins and bills of exchange; and it may become indebted upon such purchase. It requires state stocks as a basis of its circulation; and it may lawfully contract a debt in the purchase of state stocks for that purpose. There may be other ways in which a banking association can become legally indebted. If it has the right to become indebted, it may become liable for the payment of its debts, at a time when, owing to disappointment, unexpected losses, or some unforeseen casualty, it has no available assets to meet its engagements. This emergency may occur in the soundest and best regulated association. The question then must arise, whether a solvent institution is to fail to meet its liabilities, and be broken up, and ruined, or whether it shall be permitted to substitute a credit for some convenient period of time, in the place of a debt then due and payable; or, in other words, whether it can substitute one creditor in the place of another. The power to borrow, then, is a necessary incident to the power to become indebted. It is a power without which no banking association could safely carry on its business.

It is contended, however, that the loan in this case was never authorized by the company. On reference to the articles of association it will be seen that all the powers, rights and privileges of the association were delegated to, and vested in a board of directors, and such officers and agents as they should appoint. (*Art. 2, § 1, p. 50.*) It was also provided, in the articles of association, that the board of directors should have authority to make such by-laws, rules and regulations for the management of the business of the association, as they might think expedient. (*Art. 4, § 2, p. 51.*) Under and in pursuance of these provisions, the directors adopted a set of by-laws, and divided all the business of the company into two departments. (*By-Laws, §§ 1, 2, p. 55.*) They then delegated the power to

Leavitt v. Blatchford.

conduct the business of one department to a committee of investments and finance, and the power to conduct the business of the other department to a committee of foreign and domestic exchange. (*By-Laws*, §§ 1, 2, 3, 4, p. 55.) All the business of the company was to be transacted by these two committees. In this distribution the general powers of the directors over the finances were conferred upon the committee of investments and finance—and the power to borrow money, assuming it to have existed, must have been a necessary incidental part of the power of that committee. By reference to the printed case, (p. 288,) it appears that on the 28th of February, 1840, a resolution was passed by the committee of investments and finance, instructing and authorizing the drawing of bills or the granting of credits upon Palmers, Mackillop, Dent & Co. In pursuance of this resolution, a letter was sent by Beers, the president of the company, to Palmers, Mackillop, Dent & Co. informing them that the banking company had authorized a credit in favor of Davis to the amount of £46,875. It was against this credit that the bills accepted by Palmers, Mackillop, Dent & Co. were drawn. The letter of credit was signed by Beers, as president of the company.

The general banking law provides that contracts made by any banking association shall be signed by the president or vice president and cashier. (*Laws of 1838*, p. 250, § 12.) It is contended on the part of the plaintiff in this suit, that the letter of credit, being signed only by the president, did not bind the company. It cannot be denied that, if it is to be treated as the contract between the parties, it was not executed as the law required that written contracts should be; but does it follow that the loan itself, the receipt of which was authorized by the association, through the proper committee, by a resolution duly passed and communicated to the lenders, does not create a liability on the part of the company? In the case of a deposit, the depositor does not, except in special cases, receive a written contract for repayment. In the present case, the claim of the lenders is not founded on the letter of credit; it is founded on the liability of the company to repay a sum of

Leavitt v. Blatchford.

money which it legally borrowed, and for which consequently, it became legally indebted.

The next questions which arise, are as to the legality of the promissory notes and of the agreement or trust deed.

It appears by the testimony, that the bills accepted by Palmers, Mackillop, Dent & Co. were twice renewed, and that on the 5th of October, 1840, and after the second renewal, but while the bills were running, Blatchford, their attorney in fact, addressed a letter to Davis, stating that they were desirous of having the credit closed, and that they were unwilling to continue it beyond the second renewal, then in progress. After the receipt of this letter by Davis, and the communication of its contents by him to the company, it was agreed between the parties that certificates of deposit to the amount of £48,000, should be given by the company to Palmers, Mackillop, Dent & Co. payable in twelve months after date, with the privilege of renewal for six months; and that, as collateral thereto, certain securities should be assigned to Blatchford and Murray in trust. It was also agreed that Davis should give his bond for \$110,000, which should constitute a part of the securities to be assigned, and that he should be released by Palmers, Mackillop, Dent & Co. In pursuance of this arrangement, and on the 30th of November, 1840, a resolution was passed by the committee of investments and finance, approving of the form of the proposed agreement, and authorizing the proper officers of the company to execute and deliver it, together with the certificates of deposit therein referred to, and to assign the securities mentioned in the schedule thereto annexed, and to do all other acts necessary to carry into effect the provisions of the agreement. In pursuance of this resolution, and on the day of its passage, the agreement was executed and delivered to Blatchford and Murray. It appears, however, that instead of certificates of deposit being delivered as agreed upon, promissory notes were issued to the amount of the indebtedness of the company, signed by the president and cashier, payable to the order of Cooke, in twelve months after date, and endorsed by him; and it does not appear that certificates of deposit

Leavitt v. Blatchford.

were ever given. It is contended by the plaintiff that the agreement or trust deed thus executed is illegal and void.

The first objection which is made, is as to its execution. It has already appeared that it was approved by the committee of investments and finance, and that its execution was authorized by them. It also appears by reference to the instrument itself, that it was signed by the president and cashier pursuant to the provisions of the general banking law. The question then arises, whether the committee of investments and finance had the power to authorize its execution. The powers of this committee have already been examined, and it seems to me clear, that in the delegation of the powers of the directors, to the two committees, this power was conferred upon the committee which authorized the execution of the agreement. It is evident that the directors themselves supposed so, for there is no proof that any doubt or dissent was ever expressed by any one.

The next objections made by the plaintiff are to the agreement or trust deed itself. In the first place, it is contended that the promissory notes given by the company, being payable after date, are illegal and void. By the act of May 14, 1840, it is provided that no banking association shall issue or put in circulation any bill or note of such association, unless the same shall be payable on demand without interest. (*Laws of 1840, p. 358.*) It seems to me that the notes in question are clearly void by the provisions of this statute. It was contended on the argument, on the part of the defendants, that the act refers only to notes intended to be put in circulation, and capable of circulating as money; and that the fact that these notes were drawn in large amounts, and made payable in London, in sterling money, shows that there was no such intention, and could be no such effect in this case. The answer to this is, that there is no such qualification in the statute. The object contemplated by the legislature, unquestionably, was to prevent the circulation, as money, of notes not payable on demand; but the method of effecting that object was to prevent the issuing of such notes absolutely, without

Leavitt v. Blatchford.

reference to the intention or effect of such issue. But even if the qualification contended for should be adopted, it can hardly be said with certainty, that commercial ingenuity could not have devised some scheme by which the notes in question might have entered into the circulation of this state. In the case of *Swift v. Beers*, (3 Denio, 70,) the qualification which has been suggested was expressly repudiated. See also, *Ontario Bank v. Schermerhorn*, (10 Paige, 112.)

But it was farther contended on the part of the defendants, that even if the statute does apply to the notes in question, still the company is liable upon them, and the only effect of their issue is to subject the officers of the company to the penalty prescribed for the violation of the statute. There are cases in which a penalty is imposed for doing an act where the act itself is not void. These, however, are cases where the penalty is imposed merely for the purpose of revenue, and not where the act prohibited is against public policy. (*Bartlett v. Vinor*; *Carthew*, 252. *De Begnis v. Armistead*, 10 Bing. 107. *Foster v. Taylor*, 3 Nev. & Man. 244; S. C. 5 B. & Ad. 887. *Ferguson v. Norman*, 5 Bing. N. C. 76. *Hallett v. Novion*, 14 John. 290. *Cope v. Rowlands*, 2 Mees. & Wels. 149. *Griffith v. Wells*, 3 Denio, 226.) In this case the mischief intended to be prevented was the circulation of the notes of banking associations not payable on demand. The person who receives them is supposed to know the law, and by receiving and aiding in the circulation he becomes *particeps criminis*.

By reference to the agreement, or trust deed, it will be seen that certificates of deposit, and not promissory notes, were to have been given by the company. And Blatchford, the attorney of Palmers, Mackillop, Dent & Co. says in his answer, that he had the impression that they had been given, until a long time after the execution of the agreement. I will suppose, however, for the present, that the promissory notes were substituted in the place of certificates of deposit, by consent of all the parties, or in other words, that the notes given are what it was intended should be given, but that they are miscalled in the agreement. The question then arises, how far the illegality

Leavitt v. Blatchford.

of the notes renders the trust deed void. It is a well settled principle of law, that if there are different and distinct undertakings in the same contract, some of which are legal and some illegal, the law will sustain the good, and make void only the bad. "The common law is like a nursing father, and makes only void that part where the fault is, and preserves the rest." When the statute declares the instrument itself void, the rule is otherwise. Now, in this case, the indebtedness which the agreement was intended to secure was not created by the promissory notes—it already existed. The notes are merely evidences of it.

The object of the agreement was to secure the indebtedness, and not to secure the performance of an illegal contract. The notes extended the time for the payment of the debt of the company, and operated rather for its benefit than for the benefit of Palmers, Mackillop, Dent & Co. If the notes had been destroyed, the indebtedness would have remained. One of the evidences of indebtedness would be gone, and that is all. But suppose the promissory notes were a security, as they were called on the argument: the consequence then would be that, being illegal and void, Palmers, Mackillop, Dent & Co. would have one security less. It is well settled, that where there is a security given for the payment of a debt, although the security may be illegal and void, yet if in the same instrument there is a contract to pay the debt, the contract may be enforced. (*Mouys v. Leake*, 8 T. R. 411. *Kenison v. Cole*, 8 East, 231. *Ferguson v. Norman*, 5 Bing. N. C. 76. *Utica Insurance Company v. Kip*, 8 Cowen, 20.) And it necessarily follows, that if there are two securities for a debt, and one fails, the other is not affected. But it is said that the agreement in this case is, that the proceeds of the securities assigned shall not be paid over till there is a default in the payment of the notes, after they have been due, and that they being void *ab initio*, and therefore not capable of becoming due, the contingency upon which the trustees will be bound to pay over the proceeds of the securities will never occur.

There are two elementary principles applicable to all con-

Leavitt v. Blatchford.

tracts: first, that they must be construed according to their legal effect—and second, that they must be so construed *ut res magis valeat quam pereat*. Now, the object and intention of the agreement in question was to secure an existing indebtedness. The time when the notes were to become payable was fixed upon as a date when the right of Palmers, Mackillop, Dent & Co. to receive the proceeds of the assigned securities, should become absolute. As an evidence that such was the intention of the parties, the agreement itself acknowledges the indebtedness, and states that the company was desirous that the whole of it should rest on its responsibility, and that Palmers, Mackillop, Dent & Co. should make claim for it only against the company and against the securities agreed to be deposited for their indemnity. It was never intended by the parties that if, owing to any informality in the notes themselves, they should not be legally payable, the assignment of the securities should become void. Such was not the object and intention of the parties to the agreement, and such is not its legal effect. If for any cause other than the discharge of the indebtedness, the notes were not paid at the time when made payable, the rights of Palmers, Mackillop, Dent & Co. to the securities under the agreement became absolute.

But it is contended that, by the terms of the agreement, the securities are, in case of default, to be held for the benefit of the holders of the notes; and that by consequence any claim made by such holders must be made by virtue of the notes, and if they are void the claim must be void. It appears as a fact in the case, that all the notes are now held by Palmers, Mackillop, Dent & Co., and their agents. The original indebtedness existed and still exists in their favor; and it was to indemnify them that the trust deed was executed. Shall they then be permitted to lose the benefit of the indemnity because the agreement contemplated that the notes might be transferred to others, and intended in case of such transfer to indemnify the holders? The agreement says that after default shall be made in the payment of the notes, the securities shall be sold, and the proceeds shall be paid over to Palmers, Mackillop, Dent &

Leavitt v. Blatchford.

Co., or any other parties who shall then be holders of the certificates. The term "holders" is merely *descriptio personarum*, and if the holders of the notes are also the original creditors, for whose benefit alone the securities were assigned, shall it be said that they must lose the benefit of the securities, because a farther provision is made, which is not attempted to be enforced, and in reference to which, inasmuch as there has been no transfer of the notes, the question whether it can be legally enforced or not, does not, and cannot arise. The provision as to other persons than original creditors, is a distinct alternative undertaking, and ought not in equity to be permitted to destroy the claims of Palmers, Mackillop, Dent & Co.

But it is said that a court of equity cannot create a new security. This is unquestionably true, and if the construction which I have given has that effect, it cannot be sustained. In the case of *Hunt v. Rousmanier*, (3 *Mason*, 304,) which was cited on the argument, the true principle was laid down. In that case, the plaintiff, instead of taking a bill of sale of a vessel for his security, had taken a power of attorney authorizing the execution of a bill of sale. The reason given by him for doing so was, that he did not wish to take out new papers in his own name. After the execution of the power of attorney, and before any thing was done under it, the maker died. The plaintiff then claimed that the personal representatives of the deceased should execute a bill of sale; the court held, that as the plaintiff had refused to take a bill of sale, and had designedly taken a security of a different kind, which had become unavailable, they could not substitute a new security. That case differs widely from the present. Here nothing new is to be done. All that is necessary is to sustain what has been done, so far as it is legal, and to reject that which is illegal; to separate the sound from the unsound parts of the agreement.

I have hitherto considered this case as if the promissory notes were the certificates of deposit alluded to in the agreement. It now becomes necessary to consider what would be the effect upon the agreement in case they should not be so

Leavitt v Blatchford.

regarded. The consequence, of course, would be that in this respect the agreement has not been performed. But a court of equity considers that done which ought to be done, and the agreement must be construed in the same manner as if certificates of deposit had been given to Palmers, Mackillop, Dent & Co. and were now held by them.

The next questions to be considered are: 1. Whether the agreement or trust deed was executed when the banking company was insolvent, or in contemplation of insolvency? 2. Whether it was executed with the intent to give a particular creditor a preference over other creditors of the company? It appears by the testimony, that the trust deed was executed on the 30th of November, 1840. It also appears that on the 1st of October, 1840, a committee was appointed by the company to examine into the condition of its affairs. On the 23d of December, in the same year, the committee reported. In their report they state that "the accounts of the company have been for some time past in a course of critical investigation, and that a statement has been made up to the 1st of October, 1840, since which period they have undergone little if any relative change." That report was signed by the committee, and published, and states a balance of available assets, over debts, amounting to \$2,321,395,35. In opposition to this report, and for the purpose of showing its entire fallacy, and that the company was at that time insolvent, Strong, who was then a director of the company, was examined as a witness on the part of the plaintiff. His testimony is general. He states in reference to a portion of the assets, that he should "think probably one third were not collectable." In reference to other assets, he says that he "should think that but a small proportion was collected." The rest of his testimony is of the same indefinite character. Strong is the only witness on this point on whom the plaintiff relies, and it is from this testimony that we are to infer that the company was insolvent. It will be remembered, in considering how much weight is to be attached to the testimony, that in the autumn of 1840, the Commercial Bank of the city of New-York, of which the witness was at the time president, lent between

Leavitt v. Blatchford.

\$39,000 and \$40,000 to the company, and that the loan was made with his approbation and advice. It will also be remarked, that in or about the month of January, 1841, he was interested to the amount of at least one fourth in the purchase of from two to three thousand shares of the stock of the company; and what is more extraordinary, he, as one of the committee who had made a *critical investigation* of the affairs of the company, signed the report of the 23d of December, 1840, showing a surplus of upwards of \$2,000,000, and published it to the world, with his assurance of its verity. There must generally be a difficulty in ascertaining what was the value of liabilities and things in action at any particular antecedent period. But certainly there can be a nearer approximation to it, and upon more satisfactory testimony, than is offered in this case.

The proof is equally unsatisfactory to show that the agreement in question was executed in contemplation of insolvency. The company did not stop payment until some months afterward, and all their acts show that at that time, not only its earnest hope, but its sincere expectation was, that it would avoid insolvency.

But irrespective of these considerations, it does not appear that any preference was intended, or has in fact been made, or that there are not now sufficient assets in the hands of the receiver to pay all the lawful debts of the company.

It is farther objected to the agreement, that it was made to hinder, delay and defraud creditors. Before examining this part of the case, I would remark that the decision which was made by the vice chancellor of the first circuit, in the case of *Leavitt v. Yates et al.*, does not apply to the instrument in question. In that case, the trust deed executed by the company to Yates and others, was made, not to secure debts previously contracted, but to secure future liabilities about to be contracted, and which might not be contracted for the period of thirteen months afterward. The property assigned was thus locked up in trust for that space of time, when there might not be, during the whole period, any *cestui que trust* who would acquire an interest in it. In this case there was an existing

Leavitt v. Blatchford.

indebtedness. The creditors, in very decided terms, announced their resolution not to continue the credit any longer in its then existing state. It was at that time, and for the purpose of obtaining an extension, and upon the additional consideration of the release of Davis, that the arrangement, which resulted in the execution of the trust deed, was entered into. The deed declares, that till default is made in the payment of the certificates of deposit, the property assigned shall be held in trust for the company. It is contended that, by this provision, the company became the sole *cestui que trust*, and that for that reason the trust is void. Such, however, is not the legal effect of the agreement. On the contrary, Palmers, Mackillop, Dent & Co. acquired an interest in the securities immediately on the execution of the deed. Not absolute, it is true, but as absolute an interest as a pledgee ever acquires before default, in property deposited as collateral security for the payment of a debt. The company could not resume possession or ownership of the securities assigned; neither could it control them. It could not make use of, nor receive the interest or profits arising from them. It had no greater interest in them, nor advantage arising out of them, than belongs to every pledgor. The case of *Goodrich v. Downs*, (6 Hill, 438,) was particularly relied upon, on the argument, in support of the views taken on behalf of the plaintiff. In that case, an insolvent debtor, against whom a judgment had been recovered, within the thirty days' stay of execution then allowed by law, assigned nearly all his property to his son, to pay four of his creditors, and to pay over the surplus, if there should be any, to himself. The court held that this was an attempt by an insolvent debtor to put his property beyond the reach of legal process, and at the same time to reserve a portion of it for his own benefit. The statement of this case shows that it is distinguishable from the one before us. In the first place, the assignor was admittedly insolvent, and a judgment recovered against him remained unsatisfied. In the next place, there were other creditors whose debts were then due, who were hindered and delayed by the assignment. In this case, on the contrary, it appears that the company paid its

Leavitt v. Blatchford.

accruing debts and liabilities till sometime after the execution of the deed. The only thing which distinguishes this from an ordinary case of a pledge, is that the persons who were to receive the benefit of it were not made the depositories of the property pledged. If they had been, they would have become trustees for the benefit of the pledgors, except to the extent of the security for their own debts. In this case, other persons are substituted as trustees for both parties.

But it is contended that the agreement is void, because the trustees, in addition to the right to sell the securities, also had a right to borrow money upon them in case of default. That is, they are authorized to substitute a new pledge in the place of the one created by the deed; this would be the whole effect of borrowing money on the securities. Now if one pledge is legal, it is not obvious why a substitution of another contract, of precisely the same character, should not be equally so—certainly it ought not to vitiate the agreement itself.

The next question to be considered is as to the effect of the assignment of stocks of the Apalachicola Land Company, the American Land Company, and the Mississippi Land Company.

It appears from the testimony, that the Apalachicola stock was transferred to the company by Ogden, as security for his bond conditioned for the payment of \$10,000—that the stock of the American Land Company was transferred to the banking company by Beers as security for his bond conditioned for the payment of \$75,000—and that the Mississippi stock was transferred to the company by Sherwood as security for his bond conditioned for the payment of \$30,000. It also appears that neither of the bonds was assigned to Blatchford & Murray. It is contended on the part of the plaintiff, that as the bonds of Ogden, Beers and Sherwood were never assigned, the stocks never passed to the assignees. Blatchford and Murray state in their answers that they were not aware that there were any such bonds. The company of course had no interest in the stocks, other than to the extent to which they were pledged as security for the payment of the bonds, and they could assign no other or greater interest. This interest they must have

Leavitt v. Blatchford.

intended to assign, and it must have been either through carelessness, oversight or fraud, that the bonds were not assigned. The question then is, the bonds and stocks being separated, which shall follow the other? In respect to this matter, the receiver stands in the place of the company, and the question is to be decided in the same manner as it would be if this suit had been brought by the company. The company intended to assign its interest in the stocks, and it was necessary, in order to make the transfer effectual, that the bonds should pass with them. It follows, as a consequence, that the company ought to have assigned the bonds. A court of equity considers that as done which ought to be done, and the bonds must be considered as having been assigned with the stocks—and this court should enforce an assignment in fact, if necessary.

The next question which arises is, as to the bond of Beers for \$20,000. This was not included in the list of securities set forth in the original report of the committee of investments and finance. It appears to have been substituted in the place of another bond mentioned in that report; but in the final resolution of the committee authorizing the execution of the trust deed, it is stated that the form of the agreement in question was submitted to them for their approval, and that they thereby approved of it and authorized its execution, and also authorized the officers of the company to assign the securities mentioned in the schedule thereto annexed. The bond of Beers is one of the securities mentioned in this schedule, and of course passed under the assignment.

Finally, it is contended that the original indebtedness of the company was founded on a usurious consideration. The evidence relied upon as to this branch of the case is that Palmers, Mackillop, Dent & Co. charged a commission of one per cent, and in the first account which they rendered to the company charged 7 per cent interest. Palmer says in his answer, which is responsive to the bill, that no agreement was made as to interest; that the custom of his house in similar transactions was to charge one per cent more than the Bank of England charged at the same time, and that the rate of interest with

Leavitt v. Blatchford.

the Bank of England at the time of the transactions in question was five per cent. He farther states that the charge of seven per cent., contained in the first account, was made by a mistake of the clerk, and that on ascertaining the mistake, and before the commencement of this suit, the error was corrected and a new account furnished. It appears from the testimony that such corrected account was rendered. To make out a case of usury there must be a corrupt agreement, or in other words an agreement to reserve more than seven per cent. for the loan or forbearance of money. There is no proof in this case of any such agreement.

The conclusion from the views which have been expressed is, that the debt, to secure the payment of which the agreement or trust deed was given, was legally contracted, and is still due and payable; that the promissory notes given by the company being payable a year after date, were issued in violation of the provisions of the statute, and ought to be delivered over to the plaintiff to be cancelled; that the agreement or trust deed is legal and valid; and that all the securities mentioned in the schedule annexed to it passed to the trustees, subject to the trusts contained in the deed, and a decree must be entered to that effect. A provision must also be made in the decree for the payment of the costs of the defendants out of the proceeds of the assigned securities, and that the costs of the plaintiff be a charge against the assets of the company in his hands as receiver.(a)

(a) The above decision was affirmed in part and reversed in part, by the court of appeals at the December term, 1849. That court decided that the trust deed and accompanying securities were illegal and void, on the ground that they were made in violation of the act of 1840. The other questions which had been discussed in the cause were not decided, but were left to be disposed of in the suit in which the receiver was appointed.

SAME TERM. *Before the same Justices.*

JACKS and others vs. NICHOLS.

Where a contract was made between borrower and lender, for the surrender, by the lender, of notes and securities given by the borrower upon obtaining a usurious loan in the state of New-York, and for giving further time for payment, on the receipt of new securities for the amount; in pursuance of which contract, new notes, made and dated in New-York, were delivered to, and received by, the lender, in the state of C., where he was then staying, who then and there delivered up and surrendered to the borrower the former notes and securities; *Held* that the new contract, as an entire thing, must be considered as having been made in the state of C.

And no place of payment being specified in the new notes, and it not being shown that New-York was designated by the parties as the place of performance, or that the new contract was made with a view of being governed by the laws of this state; *Held also*, that the law of the place where the contract was made must govern as to its nature, validity and effect.

And such contract, if valid by the laws of the state where it was made, will not be rendered invalid, here, by reason of usury in the contract for the original loan.

It is competent for the parties to an usurious agreement, to free it from its illegal qualities. The excess of interest may be rejected by the lender, and stricken out of the contract; and the borrower may enter into a new and valid obligation to pay the sum originally loaned, with lawful interest.

This may be done in the presence of the statute of usury, and at the place of the original contract.

Such new agreement is sanctioned as well by the law, as by sound morality.
Per HURLBUT, P. J.

If the parties to a usurious agreement for a loan, after the making of the same, transfer the scene of their negotiations to another state, where any contract respecting the use of money is valid, which does not violate the principles of natural justice, and they there cancel the securities taken upon the original contract, and make a new one upon the subject of the original loan, re-affirming it, and binding the borrower to pay after a season of forbearance, which forbearance forms a part of the consideration of the new agreement, such new contract is not tainted with usury.

There is a sufficient consideration for such new agreement, in the surrender of securities *prima facie* binding upon the parties; and in the moral obligation resting upon the promiser to refund the money borrowed by him, with lawful interest.

IN EQUITY. This was an appeal by the defendant, from a decree of the former assistant vice chancellor of the first circuit.

Jacks v. Nichols.

The case in the court below is reported in *3d Sandford's Chancery Reports*, 313; where the facts are fully stated,

B. W. Bonney, for the appellant.

Jas. M. Smith, Jun. for the respondents.

By the Court, HURLBUT, P. J. We think there can be no reasonable doubt that the contract for a loan between the parties was tainted with usury, if not in its inception, certainly upon the renewal of the securities given by the Messrs. Jacks; and the only ground of defence set up against the plaintiffs' bill, which we esteem capable of being urged by the defendant, is based upon the allegation that the subsisting contract between the parties was made in the state of Connecticut, and that effect must be given to it according to the laws of that state, which for the purposes of this case, are silent on the subject of usury.

The defendant's answer, which is responsive to the bill, and must be deemed controlling on this point, contains the following history of the transaction: That before the month of June, 1842, Pulaski Jacks applied to the defendant, who was then staying at Bridgeport, in the state of Connecticut, for a further loan of the sum of \$3792,36, or for an extension of the time for the payment of the amount secured by certain notes then about to fall due, and which had been given in renewal of the credit upon the original loan; and that upon this application, Jacks offered, as security for the payment of the said amount, to deliver to the defendant a note for \$5300, made by Tyler & Jacks of New Orleans. That the defendant finally acceded to this proposal, and consented to loan for a further time the amount of \$3792,36; but the particular terms of this loan or renewal were not agreed upon until about the 6th of June, 1842, when the Messrs. Jacks, or one of them, sent to the defendant who was then at Bridgeport, Conn., their note, dated New-York, June 1, 1842, for \$100, payable in six months, to the order of Price, and by him endorsed; also, their note dated

Jacks v Nichols.

New-York, June 18, 1842, for \$792,36, payable nine months after date to the order of Samuel Jacks, and by him endorsed; also their note dated New-York, June 18, 1842, payable in twelve months to Samuel Jacks, and endorsed by him and W. A. Woodruff; and the note of P. & H. Jacks, dated New-York, 4th of June, 1842, for \$264,60, at four months, payable to the defendant's order; and also the note of Tyler and Jacks, dated at New Orleans, in Feb. 1842, for \$5300, payable in two years at the Mechanics' Bank in the city of New-York, to the order of P. Jacks & Co. and by them endorsed; *which five notes were delivered to and received by the defendant, in Bridgeport, in the state of Connecticut, on the 7th day of June, 1842, and he then and there delivered up and surrendered three former notes of the Messrs. Jacks, together amounting to \$3792,36, and all other securities which he then held for the payment of that sum or any part thereof; which three notes and other securities were all received by the said P. & H. Jacks or one of them.*

It appears then that the Messrs. Jacks applied to the defendant, at Bridgeport, and asked him to surrender all the securities which had been delivered to him upon the renewal of the original loan, and to receive in their stead the five notes before specified. The defendant agreed to do so; and did surrender the securities which he then held. He also received new undertakings, and gave further time for payment. This arrangement was consummated at Bridgeport.

The makers of some of the notes delivered on this occasion, resided in New-York—the makers of one of the notes resided in New Orleans; the notes of the Messrs. Jacks were dated at New-York—the note of Tyler and Jacks was dated at New Orleans; and the latter note was made payable in New-York, while the former notes contained no place of payment. But these facts do not aid us in fixing the place of the contract which the bill in this case seeks to avoid. If these five notes had been made payable in as many different states, it would not have severed the contract, and subjected it to the interpretation of as many different laws. The general contract in the

Jacks v. Nichols.

case is the one against which the complaint is directed, and that is the matter to be kept in view ; to wit, the contract for the cancellation and surrender of the former evidences of debt—the receipt of new securities, and for giving further time for payment.

The Messrs. Jacks obtained, on the occasion referred to, the same discharge from their liabilities as they would have got upon a payment of them, and they entered into a contract to pay, as they would have done upon a new loan. The actual payment was not made, nor was there a new advance of money by the defendant ; but there was nevertheless a good consideration for the new securities. These were delivered in Connecticut, upon a surrender there of the former notes ; and it seems to us that the contract, as an entire thing, must be regarded as having been made in that state.

The rule then is, that the law of the place where the contract was made is to control it, unless it appear upon the face of the contract, that it was to be performed at some other place ; or was made in reference to the laws of some other place ; in which case, the law of the latter place is held to control. (*Sherill v. Hopkins*, 1 *Cowen's R.* 103. 2 *Kent's Com.* 459, 460. 4 *Cowen*, 511, *n.*)

No place of payment is appointed in the notes of the principal debtors, in the present case ; and it is not shown that New-York was designated by the parties as the place of performance, or that the contract was made with a view of being governed by the laws of this state. In such a case the law of the place where the contract was made, must govern, as to its nature, validity and effect. (*See Smith v. Mead*, 3 *Conn. R.* 253.)

But the learned assistant vice chancellor said, "that even if the negotiation had been made, and the new notes signed and delivered in Connecticut, it would not in his view have altered the case in the least, since it was merely the continuation of the original loan for a longer period ; whether new securities were taken, or a covenant executed for forbearance on the old securities, the substance of the thing is the same. That there was no new loan, no new consideration, save the forbearance, and for that interest was to be paid." And he held the new

Jacks v. Nichols.

contract, although made in Bridgeport, void, on account of the original taint of usury in the loan made in this state. To this we cannot agree. It is competent for the parties to an usurious agreement to free it from its illegal qualities. The excess of interest may be rejected by the lender, and stricken out of the contract, and the borrower may enter into a new and valid obligation to pay the sum originally loaned, with lawful interest. This may be done in the presence of the statute of usury, and at the place of the original contract. Such new agreement is sanctioned as well by the law as by sound morality.

Now instead of purging the contract of the excess of interest at the place where it was made, (the only occasion for which is, the presence of the statute of usury,) the parties transfer the scene of their negotiations to another state, where any contract respecting the use of money is valid, which does not violate the principles of natural justice, and there cancel the securities taken upon the original agreement, and make a new one upon the subject of the original loan, re-affirming it, and binding the borrower to pay after a season of forbearance, which forbearance forms a part of the consideration of the new agreement; how can it be said that this contract is tainted with usury? The taint of usury is not recognized by the law of the place where it is made. There a party may agree to pay what he pleases, either for the past, or the present use of money; and hence it appears to us that the new contract would be valid. Viewed as an agreement made in a state whose laws are silent on the subject of usury, it must be considered as much divested of the taint of usury, as if it had been expressly purged of it, by the agreement of the parties made at the place of the original loan. (*De Wolf v. Johnson*, 10 *Wheat. Rep.* 367.)

But it will be said that there is no consideration for this agreement; the original contract being void. There is the surrender of securities, which were *prima facie* binding upon the parties; and especially is their money actually lent and advanced to the promiser, which creates at least a moral obligation on his part to refund it with lawful interest; an obligation

The People v. The Mayor, &c. of New-York.

which, in the face of the statute of usury, has always been recognized in a court of equity, and which we do not doubt affords a sufficient consideration to support the new contract.

This contract, in the absence of any proof to the contrary, is to be intended as legal and binding upon the parties. Having been made in the state of Connecticut, and therefore to be construed by the laws of that state, it is for the plaintiffs to show that by these laws the contract is void, before they can be entitled to the relief prayed for in their bill.

The decree of the assistant vice chancellor must be reversed, and the plaintiffs' bill must be dismissed with costs.

SAME TERM. *Strong, Hurlbut, and Edwards, Justices.*

THE PEOPLE, *ex rel.* Moore, *vs.* THE MAYOR, &c. OF THE
CITY OF NEW-YORK.

A certiorari will lie to review the *judicial* acts of municipal corporations.

Yet where the act complained of is simply *ministerial*—as the passing of an ordinance by a common council for the construction of a sewer—it cannot be reviewed on certiorari.

But although such ordinance cannot be annulled, on certiorari, it is competent for the supreme court, in a proper case, to vacate the estimate and assessment of the common council in affirming the proceedings for the construction of the sewer; as the common council then acts in a judicial capacity.

And if the estimate and assessment were substantially erroneous, and ought not to have been ratified by the common council, they may be vacated by the supreme court, on certiorari.

A corporation, after having appointed commissioners of estimate and assessment, has the right to remove them, and appoint others in their place.

An estimate of the expense of constructing a sewer, in a city, ought to be made before a contract for the work is executed, or operations are commenced. And a contract executed previous to the making of the estimate is invalid, and creates no charge against the owners of the lots assessed, nor incumbrance upon their property.

Yet the premature execution of a contract for the work will not affect the validi-

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126a	183
5	43
136a	440
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74h	175
5b	43
22a	p175

The People v. The Mayor, &c. of New-York.

ty of the original ordinance for the construction of the sewer, nor of a subsequent estimate or assessment properly made.

A common law certiorari is not a writ of right, but may be granted, or refused, at the discretion of the court.

Before allowing, or acting upon, the writ, the court should be satisfied that it is essential to prevent some substantial injury to the applicant; and that the object aimed at by him would not, if accomplished, be productive of great inconvenience or injustice. It should seldom, if ever, be allowed, to enable a party to take advantage of mere technical objections. *Per* STRONG, P. J.

CERTIORARI, to review and vacate the proceedings of the defendants relative to the construction of a sewer in John-street, in the city of New-York. From the return to the certiorari the following facts appeared. On the 29th of April, 1847, the corporation of New-York passed an ordinance for the building of a sewer in John-street. On the same day, and at the same time, the corporation appointed Elias L. Smith, Richard I. Smith and William Sinclair, jr. assessors, to make an estimate and assessment, in conformity to the ordinance directing the sewer to be built. On the 10th of May, 1847, the contract to build the sewer was made, and the sewer was to be completed on or before the 15th day of August, 1847. The sewer was completed according to contract. The assessment list bears date the 5th of October, 1847. On the 7th day of October, 1847, the common council passed a resolution that the assessors appointed in this case be removed, and that Martin E. Thompson, John T. Dodge and Revo C. Hance, be appointed assessors in their places. Thompson, Dodge and Hance took the oath on the 15th day of October. On the 29th of November, 1847, the assessment list, together with the certificate of the said Thompson, Dodge and Hance, was presented to the board of assistant aldermen for ratification, which passed that board, and was then sent to the board of aldermen and passed on the 7th day of December, and was approved by the mayor on the same day.

R. Mott, for the relator.

Willis Hall, for the defendants.

The People v. The Mayor, &c. of New-York.

By the Court, STRONG, P. J. The principal, and only material objections to the proceedings of the defendants in this matter raised by the relator are, 1st. That the corporation removed the commissioners of estimate and assessment first appointed, and substituted others in their place; and 2d. That a contract for the work was executed, and operations were commenced, before the estimate of the expense required by the statute had been made. A preliminary objection was raised by the defendants, that the relator is not entitled to any remedy by *certiorari*.

I will consider the preliminary objection first. There can be no doubt that a *certiorari* will lie to review the *judicial* acts of municipal corporations. That was admitted in the case of *Mount Morris Square*, (2 *Hill*, 14,) cited by the defendants' counsel, and is in conformity with the decisions of the late supreme court in several antecedent cases. (*Elmendorf v. The Mayor, &c. of New-York*, 25 *Wend. R.* 693; *Le Roy v. the same defendants*, 20 *John. R.* 430.) The authorities are equally clear that if the act complained of is simply *ministerial*, it cannot ordinarily be reviewed on *certiorari*. Such was the ordinance of the common council for the construction of the sewer in question. That was a simple exercise of their ministerial, or if I may use the expression, legislative power. That, if authorized by their charter, which it clearly was, resolved itself into a question of expediency, solely for their consideration, and which cannot be reviewed here. But although the ordinance itself cannot, I think, be annulled by this court, yet it is competent for us, in a proper case, to vacate the estimate and assessment of the common council in affirming those proceedings; as they then acted in a judicial capacity. That may be, although they do not constitute an ordinary judicial tribunal. It is sufficient if they are invested by the legislature with power to decide on the property or rights of the citizen. In making their decision they act judicially, whatever may be their ordinary character. The defendants are authorized by the statute, (2 *R. L. of 1813*, § 175,) to *ratify* the estimate and assessment when made, and reported to them by the commis-

The People v. The Mayor, &c. of New-York.

sioners, and then the same become binding and conclusive upon the owners and occupants of, and constitute a lien upon, the lots on which the assessments are made. In ratifying these proceedings of the commissioners the defendants unquestionably act judicially. It is not simply the performance of an act of their own, but it is *reviewing* and *deciding* upon the conduct of others. The justices of this court, in passing upon the proceedings of the commissioners, in street cases, exercise a similar power; and it has been frequently decided, that their acts in such cases may be reviewed on certiorari. And if in this case the defendants have committed a mistake in confirming acts not authorized by the statute, whereby the rights of the citizen are prejudiced, their error may be corrected by this court. It would be intolerable to allow these corporations to proceed in the exercise of their numerous, and some of their almost arbitrary powers, without some corrective. It is true, that where their acts are simply void, the law will afford a remedy; but there are many cases where their acts would not be wholly nugatory, and yet they might be very oppressive; such, for instance, as adopting a wrong principle relative to assessments, by which a citizen might be subjected to a tax, who ought not to be taxed at all. There can be no doubt that if the estimate and assessment were substantially erroneous, and ought not to have been ratified by the common council, they may be vacated by this court.

The first objection to the estimate and assessment is that they were made by persons not legally competent to act, and that consequently their proceedings were null and void. It is contended that, inasmuch as the corporation had at first appointed other commissioners, they could not subsequently create, but only fill, a vacancy. There is much plausibility in this objection from the fact, that while the statute expressly authorizes a removal in many, indeed most instances, as in cases of firemen, (§ 75,) assistant of the clerk of the common council, (§ 167,) weighmasters, (§ 238,) and commissioners of the alms-house, (§ 247,) it nowhere confers *in terms* the power to remove commissioners of estimate and assessments. Still I think, (although I

The People v. The Mayor, &c. of New-York.

must confess with some hesitation,) that the power of appointment given in general terms, and without restriction, for the purpose of carrying out some project of which it forms only a part, implies the power of removal. When the persons first appointed, refuse to act, or become incompetent by reason of insanity or bodily infirmity, which incapacities do not of themselves vacate the office, the power of removal seems to be essential, and indeed necessary to complete the project. There is a manifest difference between the delegation of a power of appointment, standing alone, and where it is incidental to, and a part of, a more general and extended transaction. Where the power is instated and single, as to appoint an arbitrator or umpire, it is exhausted by the first selection of either. But where it is general, to arbitrate, and the selection of an arbitrator merely forms a part of it, there the power of appointment would continue until the award should be made. The president and senate of the United States are authorized, by the constitution, to make various appointments to office for the purpose of conducting the affairs of the country. No power of removal is given in express terms, yet it has been uniformly exercised, and without any doubt as to its constitutionality. So the president is authorized to fill up any vacancies in office, that may happen during the recess of the senate, but he is not empowered, in terms, to effect such vacancies. Yet he has uniformly made removals during such recess, and, although his power to do so has been occasionally doubted, I believe that it is now generally admitted. The cases are not precisely parallel, yet the practice of so many eminent men, aided as they doubtless were by able legal advisers, is in favor of the validity of the principle. The cases before the late supreme court, cited by the counsel for the relator, are not decisive, if they have any force, against the validity of the power exercised by the corporation in this instance. In *The Mayor, &c. of New-York v. The Manhattan Company*, (1 *Caines' Rep.* 507,) one question was, whether a single judge who had appointed commissioners of estimate could revoke the appointment of one who was interested. The act incorporating the Manhattan Company directed that it should

The People v. The Mayor, &c. of New-York.

be lawful for the judges of the supreme court, or any one of them, to nominate and appoint the commissioners. The court say that an application could not have been (successfully) made "to the judge who granted the warrant to make a further or other appointment; for under the words of the act, the judge cannot revoke his warrant. He therefore is *functus officii*. *The only recourse then is to this court.*" The inference is plain that the court, (which had in that case the same power in respect to appointments which is vested in the corporation in the matter now under consideration,) could revoke the first, and make a second appointment. In the *Matter of Beekman-street*, (20 *John. Rep.* 269,) this court did not decide that they had not the power to make new appointments, but they denied the motion to set aside the proceedings previously instituted, and (as they said,) as a *necessary consequence*, the application to appoint new commissioners. It does not appear from the papers for what cause the defendants removed the first, and appointed the second set of commissioners in this case, but it is to be presumed that they acted from proper motives, in the absence of any evidence to the contrary.

I fully concur in the opinion expressed by Chief Justice Nelson in *Elmendorf v. The Mayor, &c. of New-York*, (25 *Wend.* 696,) that "an estimate of the expense *should* be made before the contracts are entered into, or the work is commenced." That was in a case relative to streets; but the rule, as a matter of expediency, is equally applicable to proceedings under that part of the statute authorizing the construction of sewers. It was not, however, decided in that case; nor is it at all inferable from the statute, that a premature contract for the work would affect the validity of a subsequent estimate or assessment. The precedent contract would doubtless be invalid, and would create no charge against the owners of the lots, nor incumbrance upon their property. Neither should it have any influence over the commissioners, in forming the estimate of the expenses of the projected improvement. They are bound to make all due inquiries in person; and should they adopt the opinion of others without such inquiry, they would grossly fail in discharging

The People v. The Mayor, &c. of New-York.

the obligation which their appointment, and the oath which they are required to take, devolve upon them. If, however, they in this case fully examined into the matter for themselves, and came to the same conclusion, as to the requisite expense, with that adopted by those who made the contract, I can see no reason why they should not fix their estimate at the same amount. There is nothing to prove that they did not adopt this course, and the contrary ought not to be inferred from slight circumstances; as it would involve them in the charges of a gross neglect of duty, and a violation of their oaths. I am far from approving of the conduct of the corporation in precipitately making the contract in question and commencing operations under it, but assuredly neither could affect the validity of the original ordinance. Nor do I think that those hasty proceedings could prevent their subsequently making an effectual estimate and assessment. After they had been completed, it was competent for the corporation to renew the contract previously made, and to cause the work to be prosecuted and finished pursuant to its terms.

The conclusion to which I have come is, that neither of the objections raised by the relator is well taken. But there is another point in this case which is decidedly adverse to the relief now sought by the relator. It has been decided in numerous cases, both in England and in this country, that a common law certiorari is not a writ of right, but may be granted or refused at the discretion of the court. (*Bac. Abr. tit. Certiorari, A. and cases there cited. Ludlow v. Ludlow*, 1 *Southard's N. J. Rep.* 397. *Ex parte Western*, 11 *Mass. Rep.* 417. 4 *Pick.* 25. 1 *Coze's N. J. Rep.* 318. *The People v. The Supervisors of Allegany*, 15 *Wend.* 198. 2 *Hill*, 14.) Before allowing or acting upon the writ, the court should be satisfied that it is essential to prevent some substantial injury to the applicant, and that the object aimed at by him would not, if accomplished, be productive of great inconvenience or injustice. It should seldom, if ever, be allowed to enable a party to take advantage of mere technical objections. In this case it is by no means apparent that the relator has sustained any injury. The applicants for the projected improve-

The People v. The Mayor, &c. of New-York.

ment were numerous; and but two persons remonstrated against it. The list of owners of lots assessed is large, and comprehends some of the most respectable and intelligent inhabitants of the city, and so far as appears from the papers, but one of them now opposes the proceedings. There is nothing to show that the estimate of the expenses was too high, or that the assessment was partial, unequal, or unjust. From all this it is reasonable to infer that the projected improvement was beneficial to the owners of the adjacent property, and that the amount assessed to each was no more than a fair remuneration for the benefit conferred upon him. It is by no means to be inferred that the relator will be seriously or at all injured, should the proceedings be sustained. On the other hand, should the estimate and assessment now be set aside, the owners of the lots assessed, who have paid the amount charged against them, (the number of whom has doubtless been much increased by the delay which has taken place, and for which no excuse has been offered by the relator,) could respectively sustain actions against the corporation for the return of their money, and the burthen of effecting this improvement would be thrown upon all the tax-paying inhabitants of the city, and not solely or principally upon those whose estates have been improved by the project. Under such circumstances I think we are bound to quash the certiorari in this case as improvidently issued, and my brethren concurring, an order must be entered accordingly.

Certiorari quashed.

GREENE SPECIAL TERM, May, 1848. *Harris*, Justice.

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HOSFORD vs. MERWIN and others.

On the 8th of December, 1834, F. being indebted to H. in the sum of \$330, and to A. M. in the sum of \$69, conveyed to the latter a farm of 100 acres owned by him in fee, subject to an annual rent payable to Mrs. L. At the date of this conveyance the Tanners' Bank held a note against F. for \$100, which A. M. was liable to pay, as endorser. On the 23d of January, 1835, F. conveyed to H. and A. M., jointly, a piece of land containing 38 acres, which was also subject to an annual rent, payable to Mrs. L. H. and A. M. entered into the joint possession of both lots, and for several years received and divided between themselves, the income thereof. On the 26th of April, 1845, A. M. and H. purchased of Mrs. L. her interest in the rents chargeable on the lots, for the sum of \$374,11, each paying one half, and received from her a deed of the premises. On the 31st of December, 1846, A. M. conveyed to D. S. M. his interest in the premises, and for the consideration, received from D. S. M. his note for \$600 payable in April, 1851, secured by a mortgage on the premises. A. M. afterwards assigned the note and mortgage to N. H. as security for liabilities previously incurred by N. H. for A. M.

On a bill by H. against A. M. and his wife, D. S. M. and his wife, and N. H., claiming that the plaintiff's interest in the land bore the same proportion to that of A. M. as their respective debts bore to each other; and praying that the plaintiff's interest in the premises, and in the note and mortgage, might be declared; that the premises might be sold and the proceeds divided among the parties, in proportion to their respective rights therein; and that A. M. might be decreed to account for the rents and profits, &c.; it being established by the proof, that the deed from F. to A. M., though executed without the knowledge of H., was in fact executed for the joint benefit of H. and A. M.; and that after its execution H., on being informed of the giving of the deed assented to it, and agreed to pay, and did pay, the half of the note to the Tanners' Bank, as a part of the consideration; and that D. S. M. and N. H. had notice of the plaintiff's rights.

Held that the plaintiff was entitled to a decree establishing the trust in respect to the undivided half of the 100 acres, conveyed by F. to A. M., and declaring that D. S. M. took his conveyance of the land, subject to the trust in favor of H.; and that the mortgage executed by him, to secure the purchase money, was only a lien upon the half of the premises held by D. S. M. in his own right. And the decree directed D. S. M. and wife, to release to the plaintiff his share of the premises, and that the widow of A. M. (who had died) should join in the release.

Held also, that the plaintiff was entitled to a decree for a partition of the premises, and to a reference, to take and state an account between him and the administrators of A. M. as to the rents and profits of the premises, and as to the disbursements on account of the land, previous to the conveyance by A. M. to

Hosford v. Merwin.

D. S. M.; and to a similar account between the plaintiff and D. S. M. subsequent to such conveyance. And the decrees directed the payment of any balance which should be found due to either party, upon such accounting.

Held further that the trust was the ordinary case of a trust created by one person for the benefit of another, without his knowledge, and accepted by the *cestui que trust* upon being notified thereof. And that such a trust was not prohibited by the statute. (1 R. S. 728, § 51.)

Also held that the deed which H. & A. M. took jointly from Mrs. L. on the 26th of April, 1845, operated as a *merger* of their previous interests in the premises; and that under that deed they held the land as tenants in common.

Where the justice of the case imperiously demands it, parol evidence may be received, to show the intention of the parties to a deed; and then effect may be given to such intention, as an implied trust.

In equity the *intention* constitutes the governing principle in relation to the doctrine of merger.

The fact that a defendant is in possession of premises, claiming to hold them adversely to the plaintiff, is, in general, a sufficient ground for denying a partition in a court of equity. But when the question arises upon an equitable title set up by either of the parties, the reason of the rule fails.

A court of equity will not entertain a bill for a partition when the legal title is disputed or doubtful; because a court of law is the proper tribunal to determine such questions. But when the questions are such as belong to a court of equity, it will not suspend the proceedings without doing complete justice between the parties.

IN EQUITY. On the 8th of December, 1834, Abraham Finch, of Lexington, in the county of Greene, being indebted to the plaintiff in the sum of \$330, and to Alexander Merwin in the sum of \$69, conveyed to the latter a farm in Lexington, containing 100 acres, of which he was the owner in fee, subject to an annual rent chargeable thereon. At the time of the conveyance the Tanners' Bank of Catskill held a note against Finch for \$100, which Merwin was liable to pay as endorser. Finch was also the owner of a piece of land, adjoining the 100 acres conveyed to Merwin, containing 38 acres, which was subject also to an annual rent. This lot he conveyed to the plaintiff and Alexander Merwin jointly on the 23d of January, 1835. Merwin and the plaintiff entered into the joint possession of both lots, and for several years received and divided between themselves the income of the whole. On the 26th of April, 1845, Merwin and the plaintiff purchased of Mrs. Livingston, the owner of the rents chargeable upon both lots, her

Hosford v. Merwin.

interest, and received from her a deed for the premises, containing the usual covenants, but subject to the leases under which they before held. To obtain this deed from Mrs. Livingston they paid \$374,11, each paying one half. On the 31st of December, 1846, Alexander Merwin, for the consideration of \$600, as expressed in the deed, conveyed to his brother David S. Merwin his right, title and interest in the premises. For the consideration money, David S. Merwin executed and delivered to Alexander Merwin his note for \$600 payable on the first of April, 1851, with interest, secured by a mortgage on the premises. On the 8th of February, 1847, Alexander Merwin assigned the note and mortgage to Nathaniel Hull.

On the 27th of February, 1847, the plaintiff filed his bill against Alexander Merwin and his wife, David S. Merwin and his wife, and Nathaniel Hull. It alleged that the conveyance from Finch to Alexander Merwin was made for the purpose of paying and satisfying the debts which Finch owed to the plaintiff and to Alexander Merwin, and also upon the consideration that Merwin and the plaintiff should jointly pay the note for \$100 to the Tanners' Bank, and that afterwards they did pay the note, each paying one half—that the plaintiff and Alexander Merwin went into the possession of the premises, and for a number of years they were leased by Merwin, with the consent of the plaintiff, to Finch—that they annually accounted together for the receipts and disbursements of the farm, and balances were struck upon books of account kept by Merwin and signed by the parties to such settlement—that prior to the first of January, 1844, Alexander Merwin repeatedly offered to give the plaintiff a deed for half the premises, but he claimed that his interest should bear the same proportion to that of Merwin, as their respective debts bore to each other; that to save expense and litigation the plaintiff had consented to take a deed from Merwin for half the premises, and to pay him \$50, which Merwin claimed to be due him, and that the plaintiff had requested him to execute a deed upon these terms, which he had refused to do.

Hosford v. Merwin.

The bill further stated that upon the conveyance of the premises by Alexander Merwin to David S. Merwin, no part of the consideration was paid, and that David S. Merwin took the conveyance with full notice and knowledge of the equities existing between the plaintiff and Alexander Merwin; and also that the note and mortgage were assigned to Hull without consideration, and that when he took the assignment he also had notice and knowledge of the plaintiff's rights and equities. The bill prayed that the plaintiff's interest in the premises, and also in the note and mortgage executed by David S. Merwin and assigned to Hull, might be declared by the decree of the court; that the premises might be sold and the proceeds divided among the parties entitled thereto, in proportion to their respective rights therein; that Alexander Merwin might be decreed to account for the rents and profits, and for general relief.

After the service of the subpœna, and before the defendants had answered, Alexander Merwin died. The bill was subsequently revived against Maria Merwin, his widow, Helen Merwin, his only child and heir at law, and Walter L. Barbour and Benjamin C. Miles, his administrators. The defendant David S. Merwin and his wife put in their separate answer, in which they claimed that by the conveyance from Alexander Merwin, David S. Merwin acquired title to the whole of the lot of 100 acres, subject to the payment to the plaintiff of one half the annual rent thereon, to which he became entitled under the deed from Mrs. Livingston, and also to the undivided half of the other lot, subject in like manner to the payment of half the rent to the plaintiff. They admitted that a note and mortgage were given for the consideration money, but denied any notice or knowledge of any equities between the plaintiff and Alexander Merwin.

The defendant Nathaniel Hull put in his separate answer, in which he stated that the note and mortgage executed by David S. Merwin to Alexander Merwin were assigned to him to secure him for endorsements which he had made and which he thereafter did make for Alexander Merwin. He admitted that he knew for what consideration the note and mortgage were

Hosford v. Merwin.

given, but he denied all knowledge of any equities between the plaintiff and Alexander Merwin.

Maria Merwin, the widow, and Helen Merwin, who was an infant, by Isaac B. Hinman, her guardian ad litem, put in their joint answer, in which they claimed that the lot of 100 acres was conveyed to Alexander Merwin in his own right, and that the plaintiff had no equitable interest therein. Mrs. Merwin also claimed that, never having assigned or conveyed her right of dower, she was entitled to dower in the whole lot as the same was conveyed to David S. Merwin.

The administrators also put in their separate answer, in which they denied all the allegations upon which the plaintiff claimed an interest in the lot of 100 acres, except his right to one half the rent chargeable thereon, acquired by virtue of the deed from Mrs. Livingston.

All the pleadings were put in without oath, and replications were filed to all the answers. Proofs were taken upon the hearing at the special term. The facts established by the evidence will be found sufficiently stated in the opinion of the court.

J. Van Vleck & H. Hogeboom, for the plaintiff.

D. K. Olney & J. Powers, for the defendants.

HARRIS, J. It was satisfactorily proved upon the hearing that the deed of the 8th of December, 1834, though executed without the knowledge of the plaintiff, was in fact executed for the joint benefit of the plaintiff and Alexander Merwin; that after the deed had been executed, the plaintiff, upon being informed that Merwin had taken the deed for their joint benefit, assented to it and agreed to pay, and did pay, the half of the note to the Tanners' Bank, as a part of the consideration of the deed; that Merwin kept in his books accounts between himself and the plaintiff severally, in relation to the farm, in which each was credited with what he had paid out for the farm, commencing with his debt against Finch at the time of the

Hosford v. Merwin.

conveyance, and charged with what he had received from its proceeds; that Merwin had paid a large amount for stock purchased for the farm; and on the first of January, 1841, to equalize the accounts of the parties, Merwin was credited in his account with \$217,80, for a part of the amount he had paid for stock, thus making the farm debtor to each of them, at that date, to the amount of \$550,12. On the same day another entry was made in the book in which the accounts were kept, as follows: "January 1, 1841. Balance due Alex. Merwin for stock on the Finch farm, \$139,97." This entry was signed by the plaintiff and Merwin. Thus it appears that at the last mentioned date each had advanced on account of the farm, including his debt against Finch, and interest, \$550,12 beyond his receipts from the farm, and that there was also due to Merwin on account of what he had paid for stock a balance of \$139,97. It further appears from the books, that this balance was from time to time reduced, by butter received by Merwin from the farm, until the first of January, 1845, when including interest it was \$98,54. In their respective accounts with the farm, balances were also struck at the same date, by Merwin himself, making the balance of each against the farm, including interest, \$716,19.

These facts leave no room to doubt, that from the first, it was the understanding and intention of both parties, that they were and should be jointly and equally interested in the property conveyed by Finch, and in all transactions relating to it. So far therefore as the plaintiff and Alexander Merwin are concerned, it only remains to inquire whether there is any legal obstacle in the way of giving effect to their intentions.

It is not denied that, but for the interference of the legislature, Alexander Merwin would have held the undivided half of the premises conveyed to him by Finch, in trust for the plaintiff. It is supposed, however, that the statute which declares that where a grant for a valuable consideration is made to one person, and the consideration for such grant is paid by another, the title shall vest absolutely in the person to whom the conveyance is made, (1 R. S. 728, § 51,) operates to destroy the

Hosford v. Merwin.

trust which would otherwise have resulted in favor of the plaintiff. But I do not understand the proof as bringing this case within the operation of this statute. The resulting trust which the legislature intended to prevent was a trust created by the act of the party claiming to establish such trust. The section of the statute relied upon is only applicable when the conveyance, with the consent or knowledge of the person paying the consideration, is taken in the name of another person. The object of the legislature was to prevent the creation of passive or formal trusts; and to accomplish this object it became necessary to declare void every secret resulting trust created by the voluntary payment by one person of the consideration of a conveyance to another. The legislature have carefully restricted the operation of this statute to cases in which the party claiming the benefit of the trust, himself created it. Hence it is declared in the 53d section of the same act, that the provisions of the 51st section shall not extend to cases where the alienee named in the conveyance shall have taken the same as an absolute conveyance, in his own name, without the consent or knowledge of the person paying the consideration. In this case it is proved that the deed was executed to Merwin without the knowledge of the plaintiff, and that after he had received the conveyance he informed the plaintiff that the farm had been conveyed for their joint benefit, and that each was to pay half the amount of the note at the Tanners' Bank. It is the ordinary case of a trust created by one person for the benefit of another, without his knowledge, and accepted by such other person upon being notified of such trust. Such a trust is not prohibited by statute. It belongs to what Chancellor Kent calls "that mysterious class of trusts arising or resulting by implication of law," and which the legislature have left "undefined and untouched." Such trusts arise from the obvious intention of the parties, though not expressed in the instrument with which they are connected; or they are forced upon the conscience by the manifest justice of the case. Hence it is, that such trusts are excepted from the operation of the statute of frauds. Indeed, were there no such exception in the statute, such

Hosford v. Merwin.

trusts must be recognized and enforced, from the very necessity of the case, in order to prevent the grossest injustice. A party will not be allowed in a court of equity to shelter himself from responsibility for a fraud, under cover of a statute to prevent frauds.

This doctrine is well illustrated by the ordinary case of a purchase of real estate for partnership purposes and on partnership account. No matter in whose name the title may be taken, whether in the name of one or all the partners, or even in the name of a stranger, it will be deemed, in a court of equity, to be held in trust for the indemnity of the partners, against the debts of the partnership, and also for their several proportions of the surplus. The grantee is the trustee and the partners the *cestuis que trust*. Of course, it is unnecessary to consider how far such a case would be affected by the 51st section of the statute to which I have referred. It is only referred to as an illustration of the doctrine of implied or resulting trusts.

If the object of the parties to the conveyance from Finch to Alexander Merwin, as it is established by the testimony in the case, had been expressed in the deed itself, the instrument would, I think, have been valid as a power in trust under the 58th section of the statute relative to uses and trusts, the performance of which might have been enforced in equity. (1 R. S. 734, § 96.) And where the justice of the case imperiously demands it, as I think it does in the present case, I can see no objection to the admission of parol evidence to show the intention of the parties, and then giving effect to such intention, as an implied trust. It is not, as was supposed by the defendants' counsel upon the argument, a violation of the rule which will not allow the legal operation of a deed to be controlled by parol evidence. The effect of the evidence is not to establish any fact inconsistent with the deed itself. On the contrary it admits the deed, and that it operates to vest a legal estate in the grantee. Its only effect is to engraft upon that legal estate a trust—a trust, too, entirely consistent with the terms of the deed.

I am inclined to think, also, that the deed which the plaintiff and Alexander Merwin took jointly from Mrs. Livingston operated as a *merger* of their previous interests in the premises,

Hosford v. Merwin.

and that under that deed they held as tenants in common. There can be no doubt that the deed from Mrs. Livingston, so far as it relates to the half of the premises held by Merwin in his own right, merged the conditional estate he before held. The estate he held as the grantee of Finch and that conveyed by Mrs. Livingston to him, upon the execution of the latter deed, became consolidated, and thereafter he held an absolute estate in fee in the undivided half of the premises. I think the same is also true in respect to the half conveyed by Mrs. Livingston to the plaintiff. That such was the intention of the parties, the circumstances of the case furnish the most decisive evidence. If the deed from Mrs. Livingston had been executed to Merwin alone, there would undoubtedly have been a legal merger of the estates; for then the different legal rights would have united in the same person. But even then, while he held one half of the premises absolutely in his own right, he would have held the other in trust for the plaintiff. I think the grant of the other half of the premises to the plaintiff, who was at the time of such grant entitled to an equitable estate therein subject to the same conditions as the legal estate of Merwin, operated as a merger of his equitable estate in the legal title acquired by the grant. I do not see why the conveyance to the plaintiff and Merwin jointly may not be regarded, at least in equity, as in effect the same, as if before such conveyance Merwin had executed to the plaintiff a deed co-extensive with his equitable interest in the premises. Such undoubtedly was the design of the parties when they took the deed from Mrs. Livingston; and, in equity, the intention constitutes the governing principle in relation to the doctrine of merger. I admit, however, that I have not examined "the refined and complicated distinctions" in which this branch of law learning is involved, with the same degree of diligence I should have felt to be necessary, had the rights of the parties depended upon the result. Whether the conveyance from Mrs. Livingston had the effect to vest in the plaintiff an absolute legal title to the undivided half of the premises, or not, I am satisfied that, at least as against Alexander Merwin, he is equitably entitled to

Hosford v. Merwin.

an interest in the premises of that extent, and that it is within the province of this court to protect and enforce his rights.

The next question relates to the rights of the plaintiff as against David S. Merwin and Nathaniel Hull, the former of whom claims protection as a bona fide purchaser of the premises from Alexander Merwin, without notice of the plaintiff's equities, and the latter, as an assignee, in good faith, of the mortgage executed by David S. Merwin to Alexander Merwin, to secure the purchase money of the premises. Upon this point it is enough to say, that the testimony abundantly shows the defence of both these defendants to be without foundation in fact. It is proved by a witness who drew the deed from Alexander to David S. Merwin, and who was present when it was executed, that Alexander told David, at the time, that he intended to sell his own interest in the farm, merely, and not to interfere with that of the plaintiff. The same witness further testifies, that when drawing the deed he inquired of the parties what should be the amount of the consideration inserted in the deed; that Alexander replied that it should be \$500; that David said he wanted it should be enough, and proposed to have it made \$700; and the witness, to settle the question, inserted \$600; of which, as he understood it, \$100 was added for the personal property included in the same sale. No part of the consideration has ever been paid, nor is the same payable until April, 1851. After the deed had been executed, and the same evening, the two Merwins called on the plaintiff and informed him of the sale. Alexander told him he had sold his interest to David, and advised him to sell his interest also, stating to him that he thought it better that both of them should sell out and let David own the whole farm. David S. Merwin was present at this conversation and himself spoke with the plaintiff on the subject of a purchase of his interest. With these facts in evidence, and uncontroverted, it is impossible that David S. Merwin can for a moment be regarded as a bona fide purchaser of the plaintiff's share of the farm.

The proof is equally satisfactory that, before the conveyance by Alexander to David S. Merwin, the defendant Hull knew

Hosford v. Merwin.

of the plaintiff's interest in the premises. And besides, he received the transfer of the note and mortgage merely as security against liabilities he had before incurred for Alexander Merwin. He is not, therefore, in a situation to claim protection, even as a bona fide assignee of the mortgage, against the equitable rights of the plaintiff.

The plaintiff is, therefore, entitled to a decree establishing the alleged trust in respect to the undivided half of the 100 acres conveyed by Finch to Alexander Merwin, and declaring that David S. Merwin took his conveyance of the land subject to the trust in favor of the plaintiff, and that the mortgage executed by him to secure the purchase money is only a lien upon the half of the premises held by the mortgagor in his own right. The decree should also direct the defendants David S. Merwin and wife to release to the plaintiff his share of the premises, and that the widow of Alexander Merwin, who is only entitled to dower in the other half of the premises, join in the execution of such release. It must also be referred to some suitable person, as referee, to take and state an account between the plaintiff and the administrators of Alexander Merwin in respect to the rents and profits of the farm, and also in respect to disbursements and expenditures on account of the farm previous to the conveyance by Alexander Merwin to David S. Merwin, and also a similar account between the plaintiff and David S. Merwin since the conveyance. The usual directions upon such a reference should be inserted in the decree. The decree should also direct the payment of any amount which shall, upon the accounting between the parties, be found due from either of them, upon the coming in and confirmation of the report.

The grounds upon which the defendants David S. Merwin and Nathaniel Hull have resisted the plaintiff's claim, have proved to be wholly unfounded and inequitable. But for their unjust pretences, this litigation might have been avoided. It is proper, therefore, to charge them with the costs; but the defendant Hull is to be charged with no costs upon the reference, and David S. Merwin is only to be charged with so much of

Hosford v. Merwin.

those costs as may be incurred upon the accounting between himself and the plaintiff.

The defendant Maria Merwin, having set up an unjust claim to dower in the plaintiff's half of the farm, is not entitled to costs. For the same reason costs should not be allowed to the administrators of Alexander Merwin. As between the plaintiff and these parties, neither is entitled to costs as against the other.

Helen Merwin was not a necessary or proper party to the suit. It is not pretended that she had any interest in the questions litigated, and no decree is claimed against her. The bill, therefore, as against her, must be dismissed with costs. Upon the taxation of his costs, however, her guardian ad litem is only to be allowed for the costs of the usual general answer of a guardian. The answer put in by the guardian was wholly unnecessary.

The plaintiff has also asked for a decree of partition. The defendant David S. Merwin is in possession of the farm, claiming to hold it adversely to the plaintiff. This, as a general rule, would be sufficient ground for denying the application. But when the question arises upon an equitable title set up by either of the parties, the reason of the rule fails. The court will not entertain a bill for partition when the legal title is disputed or doubtful, because a court of law is the proper tribunal to determine such questions. But when the questions are such as belong to a court of equity, there can be no reason for suspending the proceedings, short of complete justice between the parties. (*Coxe v. Smith*, 4 *John. Ch.* 271.) The plaintiff is therefore entitled to a further decree for partition, containing the usual provisions, if he shall think it advisable to continue this suit for that purpose. I am inclined to think, however, he will find it more convenient, and probably not more expensive, to institute new proceedings upon a complaint, more appropriately framed, with a view to that particular object.

MONTGOMERY SPECIAL TERM, October, 1848.

*Harris, Justice.*BANDER *vs.* SNYDER.

The farm of S. being about to be sold under a decree of foreclosure in favor of H. for about \$430, he applied to B. for assistance to pay the mortgage debt. B. advanced the money, and took an assignment of the bond and mortgage and the decree of foreclosure, in order to prevent a sacrifice of the mortgaged premises. A sale took place, under the decree, at which B. became the purchaser of the farm, at a bid of \$680, S. acquiescing in the sale, under the belief that his interest in the premises was not to be affected by it. B. purchased the property with the intention of holding it merely as security for his advances, and under an agreement with S. that S. should be entitled to the benefit of a resale. B. paid nothing on account of the premises, except the \$130 paid to H.; the balance of the \$680 bid by him, at the sale, remaining unpaid. *Held* that the agreement between the parties, being a parol agreement relating to lands, was void by the statute of frauds. And that B., having obtained the legal title, by the sale under the decree of foreclosure, was under no legal obligation to hold the premises for the benefit of S.; but that he was entitled to claim, as his own, the difference between the amount which he had paid, and the amount received by him for the farm, upon a subsequent sale thereof.

Held also, that if B. elected to avail himself of his legal right to be considered as the purchaser of the mortgaged premises, on his own account, he must be held responsible for at least the amount of the purchase money, viz. the sum bid by him at the sale under the decree of foreclosure.

Where fourteen years have been suffered to elapse between the time when the last payment upon a bond and mortgage became due, and the commencement of a suit to foreclose the mortgage, that fact, in connection with other circumstances tending to prove payment, will be sufficient to warrant the presumption that the bond and mortgage have been paid.

IN EQUITY. The bill in this cause was an ordinary bill of foreclosure. It alleged that on the 7th day of April, 1828, the defendant executed and delivered to the plaintiff, his bond, conditioned for the payment of \$375 with interest—\$100, with interest upon the whole sum, to be paid on the first day of April, 1829, and the remaining \$275 to be paid in one year thereafter, with interest—and at the same time, to secure the payment of the moneys mentioned in the condition of the bond, the defendant executed to the plaintiff a mortgage upon a piece

Bander v. Snyder.

of land in the county of Montgomery, which mortgage was duly recorded on the 20th of July in the same year. The plaintiff claimed that the whole amount of the bond and mortgage remained due and unpaid.

The defendant answered without oath. He admitted the execution of the bond and mortgage, but alleged that they were given to indemnify the plaintiff for having signed a note as security for the defendant, to William Tunnecliff, for \$375; of which sum \$250 was for money borrowed of Tunnecliff by the defendant, and the balance was for whiskey purchased of Tunnecliff at the same time, and sold to Jacob and John Henry Harder, and for which the Harders were to pay, when the note to Tunnecliff became due. The answer further alleged that the plaintiff, being indebted to the Harders to the amount of \$125, for which they held his note, requested the defendant to take up that note, by discharging his claim against the Harders for the whiskey, and agreed, in case the defendant should do so, to pay that amount upon the note to Tunnecliff. That the defendant accordingly took up the plaintiff's note to the Harders, and thereby the plaintiff became bound to pay \$125 of the note to Tunnecliff. It was further stated, in the answer, that some time in the year 1829, one Jabez D. Hammond, having a bond and mortgage against the defendant, which he was proceeding to foreclose, and the mortgaged premises, consisting of a farm in the town of Stark in the county of Herkimer, worth at least \$1000, being about to be sold under a decree of foreclosure which had been obtained by Hammond, the defendant applied to the plaintiff for a loan sufficient to pay the amount due Hammond, which was about \$430, but upon consultation it was agreed that the plaintiff should attend the sale and bid off the farm, and take a deed for it in his own name; that the defendant should have the privilege of selling the farm, and out of the proceeds the plaintiff should only receive the amount paid to Hammond with interest, and that the defendant should be entitled to the surplus; that the plaintiff was also to retain, out of the surplus, the balance of the Tunnecliff note; that the sale took place, and the plaintiff became the purchaser for the

Bander v. Snyder.

sum of \$680 ; that he paid Hammond about \$430, and paid nothing more ; that the defendant, in 1832, negotiated and consummated a sale of the farm to one Conyne for \$1000, and the plaintiff received of Conyne the whole amount of the purchase money, but had never in any way accounted for it. It was further stated that, after the purchase of the farm by the plaintiff, it was agreed, between him and the defendant, that the defendant should continue to occupy the farm, and the plaintiff should have one half of the produce ; that subsequently the plaintiff proposed to the defendant that if he would surrender the possession of the farm to his son, he would allow him \$25 for the fall ploughing, and apply that amount upon the Tunnecliff note ; that the proposition was accepted and the plaintiff's son took possession of the farm. The answer further stated that the defendant had an account against the plaintiff from and since 1831, for work, labor and services, and materials found, for the plaintiff, amounting to about \$250, which ought to be applied in payment of the plaintiff's bond and mortgage, and some additional claims consisting of notes and accounts. The plaintiff put in a replication to the answer, and proofs were taken by the parties. The cause was brought to a hearing upon pleadings and proofs.

H. Adams, for the plaintiff.

P. G. Webster, for the defendant.

HARRIS, J. Whether the bond and mortgage were executed by the defendant to secure the plaintiff against his liability as surety for the defendant upon the note to Tunnecliff, or for an indebtedness of the defendant to the plaintiff, it is not very material to determine. It is not denied that the bond and mortgage became, when executed, a valid security in the hands of the plaintiff. If they were in fact given for the purpose stated by the defendant, it is not pretended that the Tunnecliff note was paid by the defendant, or that it was not in fact paid by the plaintiff. In the examination of the case, I shall, therefore,

Bander v. Snyder.

assume that the bond and mortgage were originally a valid security in the hands of the plaintiff, for the amount mentioned in the condition.

The defendant alleges, that the first instalment which became due upon the bond and mortgage was in fact paid to the plaintiff, by taking up his note to the Harders for the same amount. I think this branch of the defence is supported by the proof. It appears that the defendant, when borrowing \$250 of Tunnecliff, also purchased of him whiskey to the amount of \$125. The purchase was probably made, as a condition of the loan. The whiskey was sold to the Harders. Subsequently the plaintiff became indebted to them in the same amount for which he had given his note. The defendant received from them that note in satisfaction of the amount due for the whiskey. Thus, in effect, the defendant, by paying the plaintiff's debt to the Harders, paid the plaintiff the amount of the first instalment upon the bond and mortgage.

Henry Murphy testified that the plaintiff had told him that he had received the money for the whiskey. Aaron Snyder also testified that, in the fall of 1843, the plaintiff told him the defendant had taken up his note to the Harders, and had given it up to him, and that he was to endorse the amount of it upon the mortgage. It is true that an attempt was made, and not without success, to impeach the character of these witnesses, especially the latter. But it appears from the evidence in the case, that Harder was residing in the county of Niagara, and might have been examined to disprove the facts in respect to which these witnesses speak, if untrue. I cannot, therefore, but regard this circumstance as sustaining, to some extent, their testimony. And, besides, it is proved by James G. Snyder, who is wholly unimpeached, that, between one and two years before he was examined, he had been requested by both the plaintiff and the defendant, to write to Harder to ascertain the amount of the whiskey note; that the only difference between the parties was in respect to the amount of the note, the plaintiff alleging that it was but \$125, and the defendant insisting that

Bander v. Snyder.

it was \$150. I therefore regard this branch of the defence as fully sustained.

The next ground upon which the defendant relies, relates to the purchase of the Hammond mortgage by the plaintiff, and his subsequent purchase of the mortgaged premises at the master's sale. It appears that Judge Hammond held a mortgage upon a farm in Stark, in the county of Herkimer, executed by the defendant, which he was proceeding to foreclose. A decree for the sale of the mortgaged premises had been obtained, and the sale had been advertised. The defendant applied to the plaintiff to advance the money to pay off the mortgage. They went together to see Hammond. While there, the plaintiff agreed to make the advance. Various modes of security were suggested, but it was finally agreed that the plaintiff should take an assignment of the mortgage. Accordingly, on the 19th of May, 1829, the plaintiff paid Hammond \$430,92, and received from him an assignment of his bond and mortgage, and the decree against the defendant. On the 15th of June following, the premises were sold by a master in chancery, under the decree. The plaintiff attended the sale and became the purchaser. It appears from the master's deed, which is made an exhibit, that the amount of his bid at the sale was \$680. No report of sale was produced on the hearing, and upon inquiry at the proper office, I have learned that none was ever in fact filed. It does not, therefore, appear from the records, whether the surplus arising from the sale was ever actually paid, or if paid, by whom it was received. The decree itself, which is also made an exhibit, contains a provision that the surplus may be paid to the defendant.

I am satisfied from the evidence in the case, that the plaintiff, as well as the defendant, understood that the title acquired at the master's sale should be held merely as security for the amount advanced by the plaintiff. Aaron Snyder testified that on the morning of the day of sale, the plaintiff came to his father's, on his way to Little Falls, where the sale was to take place; that his father proposed to the plaintiff to go with him, and the plaintiff replied that there would be no use in his

Bander v. Snyder.

going, that he would take his son Peter Bander with him, and would bid off the place, and afterwards they would make it right between them—that all he wanted was the money he had paid Judge Hammond, and the interest—that each should endeavor to sell the farm, and if it could be sold for more than the amount paid by the plaintiff, the excess should belong to the defendant. The same witness states that after the sale he heard the plaintiff say that he had bid \$670, or \$680; that he should not have been obliged to run up the place so high, at the sale, if it had not been for William Borland, and that he would have had to bid still higher, if he had not demanded the specie. Murphy also testified, that after the sale, the plaintiff told him he had bid off the farm for the defendant; that it would not have come so high as it did, had it not been that William Borland bid it up; that he further said he told Borland that he had come to bid off the farm for the defendant, and demanded specie, and then Borland bid no more. Murphy is the uncle of the defendant, and also of the plaintiff's wife. He was employed by the parties to draw the bond and mortgage, which is the subject of controversy in this suit. He was in the 84th year of his age when he testified. His connection with the parties would naturally account for the knowledge he professes to have of the transactions of which he speaks. And yet, he should perhaps be regarded as so far impeached by the witnesses who have testified as to his character, as to render it unsafe to rely upon his testimony, where he is not sustained by other evidence, or corroborated by circumstances. The same is more emphatically the case in respect to the testimony of Aaron Snyder, who is the defendant's son, and who was, at the time of some of the transactions of which he speaks, very young.

I proceed, therefore, to notice some other parts of the testimony, having perhaps some proper bearing upon this branch of the case. It appears that when the plaintiff purchased the farm, George Pelton occupied it, working it upon shares; that the next year the income of the farm was divided between the plaintiff and the defendant, and that the succeeding year the

Bander v. Snyder.

plaintiff's son went into possession and continued to occupy it until the spring of 1837, when it was sold to Cornelius Conyne. When the plaintiff took possession of the farm for his son, a question was made between the parties in relation to the fall ploughing, which had been done by the defendant, and it was agreed that Pelton and one Winegar should fix the amount that the plaintiff should allow the defendant for the fall ploughing. They fixed the amount at \$25. Pelton also testified that in a conversation had with the plaintiff, three or four years before, he told him *that if the defendant would allow him what he had paid Hammond, and the interest, it was all he wanted.* Conyne testified that he negotiated with the defendant for the purchase of the farm; that after he had taken possession he found it very foul, and claimed of the plaintiff some allowance on that account; that the plaintiff told him he must look to the defendant, who had sold him the farm. Aaron Snyder also testified that in a conversation he had with the plaintiff in the fall of 1843, about the business between his father and the plaintiff, he said that all he wanted out of the money for which the farm was sold to Conyne, was the money he had paid to Hammond, and the interest; and in the same conversation he added that he and the defendant would settle their business, and if he owed the defendant he would pay him, and if the defendant owed him he could pay him; that they could settle their business better than any body else; that upon another occasion, about the same time, the defendant called to the plaintiff as he was passing, and told him he had received a letter from John Darrow stating that the bond and mortgage had been left with him for foreclosure; that the plaintiff said he did not know any thing about it; that it must have been done by his son Daniel, and that he would stop it; that they could settle their business better than the lawyers could; that the defendant then told him he had a good deal of his money in his hands, to which the plaintiff replied that he knew it, and that they would settle it themselves. Murphy further testified, that soon after the bond and mortgage was executed, he was requested by the plaintiff, when at his house, to look over

Bander v. Snyder.

and see what there was between him and the defendant; that he gave him the mortgage and he cast the interest upon it; that he did not recollect what else there was between them; that, as nearly as he could recollect, there was a balance of between \$30 and \$50 in favor of the plaintiff. But I do not deem it necessary further to notice the testimony in detail.

The best examination I have been able to give the mass of evidence presented in this case, has resulted in the following conclusions: that the defendant, finding himself called upon to pay his bond and mortgage to Hammond, applied to the plaintiff, to whom he was related by marriage, and with whom he was on terms of intimacy, for assistance; that the plaintiff advanced the money and took an assignment of the bond and mortgage, and the decree of foreclosure, at the instance of the defendant, and to prevent a sacrifice of the mortgaged premises; that, notwithstanding this transfer, the sale was allowed to proceed, and the plaintiff became the purchaser, upon a bid of \$680; that the defendant acquiesced in the sale, under the full belief that his interest in the premises was not to be affected by it; that the plaintiff also, in fact, purchased the premises with the intention of holding them merely as security for his advances, and under an agreement that the defendant should be entitled to the benefit of a resale; that after the plaintiff had acquired the title, the defendant cultivated the premises one year, dividing the crops with the plaintiff, and then the plaintiff himself took possession, and, through his son, occupied them until the spring of 1837, when the premises were sold to Conyne; that it was agreed between the parties that the plaintiff should receive the proceeds of the premises as an equivalent for the interest on his advances; that the only amount ever paid by the plaintiff, on account of the premises, was the sum of \$430,92, paid to Hammond, and, perhaps, the master's fees upon the sale; that the balance of the \$680, bid by the plaintiff at the sale, was never paid by him, to the defendant, or otherwise; that in April, 1837, the premises, through the agency of the defendant, were sold to Conyne for \$1000, and the plaintiff received the whole amount of the purchase money;

Bander v. Snyder.

that the first instalment upon the plaintiff's bond and mortgage, with the exception, it may be, of a small amount of interest, was in fact paid, by means of the Harder transaction; that before the second instalment became due, the plaintiff had acquired the title to the other premises mortgaged to Hammond, and that from the time the last instalment upon the plaintiff's bond and mortgage became due, which was in April, 1830, until shortly previous to the filing of the bill in this cause, in June, 1844, the plaintiff made no claim upon the defendant for the payment of any amount due upon his bond and mortgage.

It only remains to determine the rights of the parties upon the facts thus established. So far as it relates to the title acquired by the plaintiff at the master's sale, I agree with the plaintiff's counsel, that the case is within the statute of frauds. Whatever the moral duty he owed the defendant, the plaintiff having obtained the legal title to the premises sold under the decree of foreclosure, was under no legal obligation to hold the premises for the defendant's benefit. It is true, he had agreed to do so; but the agreement was not in writing. And as it was an agreement relating to lands, it was within the statute for the prevention of frauds, then in force; a statute, the wisdom of which is evinced by the fact, that amid all the changes of more than 170 years, it has remained unchanged. Though he was enabled to obtain the title through professions of disinterested friendship, having obtained it, he had the legal right, if he chose to do so, to take advantage of the too great confidence of the defendant, and to claim, as his own, the difference between the amount which he had paid and the amount he received upon the sale of the farm. In respect to the morality of such a claim there could not well be a difference of opinion; but it is the policy of the law not to enforce an agreement, relating to lands, unless it be in writing; and, though injustice and hardship may be, and doubtless are, the result in many cases, those cases must yield to the enforcement of the general and salutary rule. (*See Hall v. Shultz*, 4 John. 240; *Sherrill v. Crosby*, 14 Id. 358.)

Bander v. Snyder.

But if the plaintiff elects to avail himself of his legal right to be considered as the purchaser of the mortgaged premises, on his own account, he ought not to complain if he is held responsible, at least for the amount of the purchase money. This amount exceeds, by a sum about equal to the amount unpaid upon the bond and mortgage sought to be enforced in this suit, the sum paid by the plaintiff to Hammond. There would probably be a small balance of interest in favor of the plaintiff. It may be that it was to this that Murphy referred, when he said he made the balance in favor of the plaintiff between \$30 and \$50. To any such balance, the sum of \$25, which the plaintiff agreed to allow the defendant when he surrendered the possession of the farm, would be applicable. So that, in this view of the case, the bond and mortgage, upon which this bill is filed, must be considered as in fact paid. But if there could be any doubt upon this point, when regarding the testimony alone, such doubt can no longer be entertained, when the circumstances of the case are considered in connection with the fact that fourteen years were suffered to elapse between the time when the last payment upon the bond and mortgage became due, and the commencement of this suit. When the forbearance has continued twenty years, this alone is sufficient, of itself, to warrant the presumption of payment; and when connected with circumstances tending to prove payment, a shorter period will be sufficient. (2 *Phillips' Ev. Cowen & Hill's ed.* 171. 3 *Starkie's Ev.* 1090. *Cowen & Hill's Notes*, 316.) Having arrived at this conclusion, it is unnecessary to examine the evidence relating to the account upon which the defendant relies as a set-off. There must be a decree dismissing the bill with costs.

NEW-YORK SPECIAL TERM, November, 1848. *Harris*, Justice.

LAWRENCE *vs.* ELMENDORF and POOL.

Where administration is granted upon the same estate, in different states, upon what principles is the administration to be governed ?

It seems to be settled, at least in this country, that the administration of the estate of a deceased person is to be governed by the laws of the state authorizing such administration. *Per HARRIS, J.*

The general rule is that the effects of a deceased person are to be administered under the authority of the local jurisdiction in which they are situated. And in such administration respect should be had to the aggregate amount of the estate, and debts, foreign and domestic.

The true principle which should govern, in all cases of double administration, is so to marshal the different funds under administration as to produce equality among all creditors, whether foreign or domestic.

Upon this principle the courts of this state will so control the distribution of funds here, in reference to preferences obtained by creditors of an intestate in another state, as to secure equality among all the creditors.

THIS was a motion for an injunction. The plaintiff alleged in his complaint, that Isaac Lawrence died on the 12th of July 1841, intestate, and that letters of administration upon his estate were granted by the surrogate of New-York to John L. Lawrence. That the administrator, on the 13th of July, 1843, presented to the surrogate a petition praying for authority to sell the real estate of the deceased for the payment of his debts ; and such proceedings were had upon the petition, that the real estate of the deceased had been sold and the proceeds brought into the office of the surrogate for distribution. That the debts established against the estate amounted to \$457,316,94, upon which dividends had been paid, to the amount of about 47½ per cent. That of the debts against the estate, \$403,759,76 were owned by the plaintiff, and that the assets of the estate in the state of New-York would not realize more than ten per cent. beyond the dividends already paid. The complaint further stated that the defendant Elmendorf, who was a resident of the state of New Jersey, proved his debt against the estate, amounting to \$1759,21, and had received the same dividends

Lawrence v. Elmendorf

thereon as other creditors; that he had procured letters of administration to be granted upon the estate in New Jersey, to one Frelinghuysen, without notice to the plaintiff or other creditors in New-York; that the administrator in New Jersey had procured an order to *limit creditors*, which was published in that state, and did not come to the knowledge of the plaintiff until after the time limited therein had elapsed. That the only claims presented were those of Elmendorf and the defendant Pool, who was also a resident of New Jersey; that Elmendorf's claim was the same he had proved before the surrogate of New-York, and Pool's had also been established before the surrogate of New-York, although the plaintiff had subsequently filed his bill in equity, in New-York, against Pool, alleging that the decree establishing his debt had been obtained by fraud, and praying that he might be restrained from the collection thereof. That the administrator in New Jersey allowed the claim of Elmendorf, and also that of Pool, to the amount of about \$11,000, and thereupon made application for authority to sell certain real estate in that state of which Isaac Lawrence died seised—and a decree was made directing him to sell such real estate and divide the proceeds ratably between the defendants. That the real estate had been sold under such decree for about \$3000, and the sale had been confirmed. That the defendants contended they were entitled to divide the proceeds of the real estate in New Jersey between themselves, to the exclusion of other creditors, and also that they were entitled to share equally with other creditors in the proceeds of the real estate sold in New-York. The plaintiff asked that so much of the moneys to be distributed by the sheriff of New-York as the defendants would otherwise have been entitled to receive, might be distributed to the other creditors who had proved their debts, so that having regard to the whole amount of assets in both states, all the creditors might participate equally, in proportion to their respective debts—and in the meantime that the defendants might be restrained from receiving from the surrogate of New-York any dividend which might be declared in their favor.

Lawrence v. Elmendorf.

The answers of the defendants did not materially vary the facts as above stated.

W. B. Lawrence, for the plaintiff.

George Wood, for the defendants.

HARRIS, J. Where administration is granted upon the same estate, in different states, what are the principles upon which the administration is to be governed? This inquiry has been much discussed and ably considered by the most eminent jurists of our country. All agree that it involves considerations equally delicate and difficult. It seems now to be settled, at least in this country, that the administration of the assets of a deceased person is to be governed by the laws of the state authorizing such administration. "The ground upon which this doctrine has been established," says Mr. Justice Story, "is, that every nation has a right to dispose of all the property actually situate within it, so as to protect itself and its citizens against the inequalities of foreign laws which are injurious to their interests." (*Story's Conflict of Laws*, §§ 524, 525.)

The subject was very fully examined and discussed by Chief Justice Parker, in *Dawes v. Head*, (3 Pick. 128.) In that case Thomas Stewart had died at Calcutta, insolvent, and leaving a will which had been duly proved in the country where the testator had his domicile at the time of his death. Having property at the time of his death, in Massachusetts, letters of administration with the will annexed were granted in that state, to Head. The question considered in that case was, whether the funds collected in Massachusetts should be appropriated to the payment of such debts as might be regularly proved there, although it had been made to appear that the whole estate was insufficient to pay all the debts, and that the effects there were wanted by the executor abroad to enable him duly to administer the estate. "What shall be done," the learned judge emphatically inquires, "to avoid on the one hand the injustice of taking the whole funds for the use of our

Lawrence v. Elmendorf.

citizens, to the prejudice of foreigners, when the estate is insolvent, and on the other, the equal injustice and greater inconvenience of compelling our own citizens to seek satisfaction of their debts in distant countries?" His answer, which is repeated and commended by Chancellor Kent, (2 *Kent's Com.* 434,) is equally emphatic. "The proper course," he says, "would undoubtedly be, to retain the funds here for a *pro rata* distribution, according to the laws of our state, among the citizens thereof, having regard to all the assets, either in the hands of the principal administrator or of the administrator here, and having regard also to the whole of the debts which by the laws of either country are payable out of those assets, disregarding any fanciful preference which may be given to one species of debt over another, considering the funds here as applicable to the payment of the just proportion due to our own citizens, and if there be any residue it should be remitted to the principal administrator, to be dealt with according to the laws of his own country."

The same doctrine has been established in Pennsylvania; (*Mothland v. Wiseman*, 3 *Penn. Rep.* 185; *Case of Miller's estate*, 3 *Rawle*, 312;) also in South Carolina; (*Topham v. Chapman*, 1 *Const. Rep. S. C.* 292.) The general rule, as derived from all the cases on the subject, seems to be, that the effects of a deceased person are to be administered under the authority of the local jurisdiction in which they are situated; and that in such administration respect should be had to the aggregate amount of the estate, and debts foreign and domestic. (See *Heirs of Porter v. Heydock*, 6 *Verm. Rep.* 374; *Harvey v. Richards*, 1 *Mason*, 381; *Doolittle v. Lewis*, 7 *John. Ch.* 49.)

It is true that in the cases to which I have referred, and indeed in all the cases I have examined in reference to this subject, the question arose upon what is called the auxiliary or ancillary administration. But I understand the terms, principal and auxiliary administrations, to be used as indicating the objects of the different administrations, and not any distinction in law as to the rights of the parties. Each administration, whether granted in the state of the deceased person's domicile or

Lawrence v. Elmendorf.

a foreign state, is, so far as it relates to jurisdiction, independent and exclusive. On the other hand, so far as it relates to the payment of debts, each is auxiliary to the other. (*See Harvey v. Richards, above cited.*) I cannot doubt, therefore, that if it was the duty of the court, in *Daves v. Head*, to retain the funds subject to its control, for the purpose of securing to the citizens of that state, who were creditors of the estate, their proper share of all the assets of the estate, it was equally the duty of the court at Calcutta to see that the action of the court in Massachusetts did not deprive other creditors of a just participation in the funds of the estate. I think the true principle which should govern in all cases of double administration is, as it was stated to be by the plaintiff's counsel upon the argument, so to marshal the different funds under administration as to produce equality among all creditors, whether foreign or domestic. It is upon this principle that courts of equity interfere to marshal funds so that all parties having equal equities may receive their due proportions. The surrogate's court may not be competent to make such an equitable adjustment; but there can be no doubt of the power of a court of equity to interfere for the purpose of effecting this result.

I am aware that a distinction has been supposed to exist between the proceeds of real estate sold for the payment of debts and the proceeds of personal estate. The general rule in respect to the latter is that it follows the person of the owner, and must be governed by the law of the place where he has his domicile, while the title to real estate and the disposition of it, is exclusively regulated by the law of the place where it is situated. Accordingly it is said by Justice Story, (*Conf. of Laws*, § 523,) that if an administrator sells real estate for the payment of debts, pursuant to the authority given him under the local laws *rei sitæ*, he is not responsible for the proceeds, as assets, in any other state, but they are to be disposed of, and accounted for, solely in the place, and in the manner, pointed out in the local laws. But I do not think this principle affects the question under consideration. It is admitted that the proceeds of the real estate sold in New Jersey must be disposed of according to

Lawrence v. Elmendorf.

the laws of that state, but the question is whether, in the disposition of the proceeds of other real estate sold in this state for the payment of debts, regard may not be had to the fact that some of those debts are also entitled to be partially or fully paid out of funds arising from the sale of other real estate in another state. It was said upon the argument that the proceedings in New Jersey having been taken since the defendants' debts were established in New-York, no notice can be taken of those proceedings here. But is this so? Suppose the defendants, by means of the administration in New Jersey, had succeeded in obtaining payment of the entire amount of their debts, could it be pretended that because the surrogate of New-York had made an order establishing their right to a ratable proportion of the funds raised in this state, with other creditors, they were entitled to their dividend, notwithstanding their debts had been paid? No one would maintain, for a moment, such a position; and yet it seems to me that the same principle that would require the court here, in the case I have supposed, to withhold from the defendants their dividend, requires the court so to control the distribution of the funds here, in reference to the preference the defendants have obtained in New Jersey, as to secure, what the law intends, equality among all the creditors.

Suppose the converse of the facts as they are presented here had been the case—that the defendants had not proved their debts in New-York so as to entitle themselves to receive their share of the funds raised here; and that the plaintiff, after having established his debt and received his dividends here, had also proved his debt in New Jersey and claimed to share equally with the defendants there: would any one doubt the power of the court there to pay the defendants their full share of the estate, having reference to the assets and the debts in both states? *Davis v. Estey*, (8 Pick. 475,) was such a case. Administration had been granted upon the estate of David Hicks, in Vermont, where he resided at the time of his death. The estate was insolvent, and the time prescribed by law for proving debts against it had expired. Davis, having received no notice of the proceedings, had not presented his claim.

First Baptist Church in Schenectady v. Sch. & Troy R. R. Co.

Subsequently administration was granted upon the same estate in Massachusetts. The administrator, under authority obtained for that purpose, sold the real estate which Hicks owned in that state at the time of his death. The proceeds were sufficient to pay the debt of Davis, in full. The court held that as the estate was insolvent, the creditor in Massachusetts was not to be paid his whole debt to the prejudice of the creditors in Vermont, but only a *pro rata* dividend. The administrators were directed to ascertain the amount of the assets and debts in both states and to pay the creditors there, *pro rata*. I am satisfied that this is the proper rule to adopt in the present case. The motion for an injunction is therefore granted.

RENSSELAER GENERAL TERM, November, 1848. *Harris, Watson, and Parker*, Justices.

THE FIRST BAPTIST CHURCH IN THE CITY OF SCHENECTADY vs. THE SCHENECTADY & TROY RAIL-ROAD CO.

An action on the case lies against a rail-road company for a nuisance, in running their cars and engines, ringing bells, blowing off steam, and making other noises in the neighborhood of a church, or meeting house, on the sabbath, and during public worship, which so annoy and molest the congregation worshipping there as greatly to depreciate the value of the house, and render the same unfit for a place of religious worship.

An action for such an injury is properly brought in the name of the church, in its corporate capacity, and need not be brought by the individuals affected thereby.

And it is properly brought against the rail-road company, as a corporation, instead of against its agents, who caused the noises to be made.

An action on the case for either a public or private nuisance will be sustained, by proof of a wrongful act done by the defendant, and actual damage resulting to the plaintiff therefrom. *Per HARRIS, P. J.*

In both cases the action is founded upon the principle recognized in the maxim *sic utere tuo, ut alienum non laedas*. Hence it is, that acts, in themselves lawful, become wrongful in consequence of the time, or place, or manner of performing them. *Per HARRIS, P. J.*

First Baptist Church in Schenectady v. Sch. & Troy R. R. Co.

Where a party is disturbed in the lawful enjoyment of his property, by the wrongful act of another, and he sustains a pecuniary injury thereby, an action on the case lies.

As respects the proof of injury, which is required, it is enough to show that the plaintiff's property has, by the wrongful act of the defendant, been rendered less valuable for the purposes to which the owner has seen fit to devote it. It need not appear that its value would be equally depreciated for any other object.

A corporation is liable for an injury done by its servants, if, under like circumstances, an individual would be responsible.

THIS was an action on the case for a nuisance, tried at the Schenectady circuit in October, 1844, before PARKER, circuit judge. The declaration stated that the plaintiffs were the owners and lawfully possessed of a lot of land in the city of Schenectady, upon which there had been erected a building, for the purpose of being used as a meeting house or place of religious worship; that the defendants were the owners and possessors of a rail-road, running near and contiguous to the plaintiffs' premises, upon which they were accustomed to run their cars and locomotive engines; that on the 5th of April, 1843, and on divers other days between that time and the time of the commencement of the suit, the defendants wrongfully, improperly and injuriously, by themselves and their agents, on the sabbaths, when the religious society or congregation, accustomed to use the said meeting house, were lawfully assembled therein, and engaged in public and religious worship, by ringing their stationary bell contiguous to the said house of worship, and their bell attached to their locomotive engines, and by the puffing and whistling of said engines, and blowing off steam therefrom, while standing near to said house of worship, and by the rumbling, jarring noise of their cars and steam engines when moved and propelled by steam on their rail-road, and by the unlawful and improper use of their rail-road on the sabbaths, disturbed, annoyed and molested the said religious society or congregation while engaged in worship; by means whereof the value of the said house of worship was greatly depreciated and the same was rendered entirely unfit for, and valueless as a house of religious worship.

First Baptist Church in Schenectady v. Sch. & Troy R. R. Co.

The defendants pleaded first, not guilty, and *secondly*, that by an act of the legislature entitled "An act to provide for the construction of a rail-road from Schenectady to Troy," passed May 21, 1836, and another act entitled "An act to amend the charter of the Schenectady and Troy Rail-Road Company," passed February 21, 1839, the defendants were authorized and empowered, by themselves and their servants, on the sabbaths, when the said religious society or congregation in the plaintiffs' declaration mentioned, were lawfully assembled in said meeting house and lawfully engaged in public and religious worship, to ring their stationary bell, &c. &c.—and if the said religious society or congregation was disturbed, annoyed or molested by the ringing, &c. or if the value of the said meeting house of the plaintiffs had been greatly depreciated, or if the same had been rendered valueless or unfit for use as a house of religious worship, the same had necessarily and unavoidably happened in the lawful use of the defendants' rail-road, as they were authorized and empowered to use the same by virtue of the acts of the legislature aforesaid. To the second plea the plaintiffs replied that the defendants without authority and power and the causes by them in their second plea alleged, committed the said several grievances, &c.

Upon the trial the plaintiffs proved substantially the allegations in their declaration. It was admitted that the defendants had constructed their road in pursuance of the acts of the legislature mentioned in their second plea, and that they had done what was necessary to obtain and had obtained title to and possession of the land through which their road was constructed.

The defendants' counsel insisted upon the following points: 1. That no action for a nuisance could be maintained by the plaintiffs in their corporate capacity, against the defendants, for any acts done by them in the ordinary use of their road in pursuance of and by the authority of the legislature. 2. That there was no evidence of any injury to the value of the plaintiffs' property, otherwise than for a place of public worship, and that the disturbance of the congregation could not affect the plaintiffs, as a corporation, but only the individuals assembled.

First Baptist Church in Schenectady v. Sch. & Troy R. R. Co.

3. That if any action could be maintained for a nuisance, it must be brought by the individuals affected thereby; and if, as in this case, no damage was sustained but that which the law presumes every citizen to sustain by a common nuisance, then no action would lie. 4. That if such action could be sustained at all, it should have been brought, not against the defendants as a corporation, but against the individuals who caused such noise to be made. The circuit judge decided that upon the evidence the plaintiffs were entitled to recover, and directed the jury to find a verdict for the plaintiffs for nominal damages. The defendants' counsel excepted and the jury rendered a verdict of six cents for the plaintiffs.

J. K. Porter, for the plaintiffs.

J. Pierson, for the defendants.

By the Court, HARRIS, P. J. In the examination of this case I propose first, to inquire whether the facts alleged and proved constitute a cause of action, and then, if an action can be maintained, whether the plaintiffs are the proper parties to sue; and again, whether the defendants are the proper parties to be sued. These questions involve all the points presented upon the argument.

First, then, can an action be maintained for the annoyance of which the plaintiffs complained? Nuisances are of two kinds, public and private. The former are defined to be such inconvenient and troublesome offences as annoy the whole community in general, and not merely some particular person. (4 *Chitty's Black.* 167.) The latter, any thing done to the hurt or annoyance of the lands, tenements or hereditaments of another. (3 *Chitty's Bl.* 216.) It is not easy, in every instance, to determine to which of these classes an alleged nuisance belongs. Indeed, there are some cases where the offence may be regarded as both public and private. Thus, if one obstruct a water-course so that the water flows back upon the land of another, it is a private nuisance for which an action will lie;

First Baptist Church in Schenectady v. Sch. & Troy R. R. Co.

and if the overflowing of the land have the effect, as it often does, to render the neighborhood unhealthy, it is also a public nuisance, and of course the subject of criminal as well as civil prosecution. And in general, all nuisances which, when injurious to an individual, are actionable, are, when detrimental to the public, indictable also. So on the other hand, if a person sustain some particular damage, beyond the rest of the community, by a public nuisance, he may maintain his private action for satisfaction, while at the same time the public may prosecute criminally for the offence. The distinction, therefore, between public and private nuisances, so far as it relates to civil remedies, is of but little practical value. In either case the action is sustained by proof of a wrongful act done by the defendant, and actual damages resulting to the plaintiff from such wrongful act. In both cases the action is founded upon that great law of christian morality which requires every man to do to others as he would have others do to him. The same great principle is recognized in the legal maxim *sic utere tuo, ut alienum non laedas*. Hence it is, that acts, in themselves lawful, become wrongful in consequence of the time, or place, or manner of performing them. Thus there are various trades and manufactures, useful and lawful when exercised in remote and proper places, which become nuisances when carried on where they necessarily incommode and annoy others. In accordance with this principle it has been held that the erection and use of a smith's forge, or a lime kiln, or a tobacco mill, or a tannery, or a slaughter house in the vicinity of another's house, whereby it is rendered useless or even uncomfortable for the purposes of habitation, is a wrongful act, for which an action lies. (2 *Starkie's Ev.* 979, *tit. Nuisance*. 3 *Chitty's Black.* 216.)

The doctrine on this subject is well stated by Chancellor Walworth, in the conclusion of his opinion in the court for the correction of errors, in *Lansing v. Smith*, (4 *Wend.* 25.) "If" says he, "a person has sustained actual damage by the erection of a nuisance, whether direct or consequential, I am not prepared to say he cannot maintain an action against the wrong-

First Baptist Church in Schenectady v. Sch. & Troy R. R. Co.

doer. If he sustains no damage but that which the law presumes every citizen to sustain, because it is a common nuisance, no action will lie. But the opinion I have formed on this point is, that every individual who receives actual damage from a nuisance may maintain a private suit for his own injury, although there may be many others in the same situation. The punishment of the wrongdoer by a criminal prosecution, will not compensate for the individual injury; and a party who has done a criminal act cannot defend himself against a private suit by alleging that he has injured many others in the same way, and that he will be ruined if he is compelled to make compensation to all."

The action for a nuisance is aptly compared, by Mr. Justice Sutherland, in delivering the opinion of the supreme court, in the same case of *Lansing v. Smith*, (8 Cowen, 146,) to an action of slander for words not actionable in themselves, or an action by a master for the beating of his servant, or by a parent for the debauching of his daughter. The wrongful act of the defendant must be shown, but the gist of the action is the special damage. The important question, upon this branch of the case, then is, whether the pleadings and the evidence bring the case within these well established principles.

The complaint is, in brief, that the defendants by the ringing of their bells, and blowing off steam, and other noises, in the neighborhood of the plaintiffs' meeting house, on the sabbath, and during the period of public worship, so annoyed and molested the congregation worshipping there, as greatly to depreciate the value of the house and render the same entirely unfit for a house of religious worship. The evidence is sufficient to show, that by the disturbances of which the plaintiffs complain, the usefulness of their house, for the purposes to which it had been appropriated, is at least impaired. This is not seriously controverted by the defendants, but they insist that they have done no more than by their charter they were authorized to do, and that therefore, if the plaintiffs have sustained damage by their acts, it is *damnum absque injuria*. If this position is true in point of fact, it is an answer to the action. If the defendants

First Baptist Church in Schenectady v. Sch. & Troy R. R. Co.

have only pursued the path prescribed for them by the laws from which they derive their existence, they have committed no wrongful act. Though the plaintiffs may have sustained damage, it is, indeed, *damnum absque injuria*; for the act of the law, like the act of God, works no wrong to any one. But I find nothing in the statutes which give the defendants existence and prescribe their corporate powers, which can be construed to justify them in creating the nuisances of which the plaintiffs complain. They are indeed authorized to make their rail-road, and to acquire the land necessary for that purpose. They are also authorized to use their road for the transportation of passengers and freight. But in the exercise of this authority they are not to be exempt from liability for injuries to others, to the same extent as if the rail-road had been constructed and used by individuals owning the land, without legislative sanction. If, either in the construction or use of the road, they commit an act for which an individual, under the same circumstances, would be liable, they too must be held answerable for the consequences. Every corporation takes its powers subject to this implied restriction. Any other doctrine would lead to unimaginable mischiefs. Where, as in this country, corporations are so multiplied and so extensively engaged in the various departments of business, to hold that they may, with impunity, do any act for which an individual would be amenable to justice, would result in the most pernicious consequences.

Assuming, then, that corporations, like individuals, are answerable for the damages resulting from the wrongs they do, we come back to the question whether the acts complained of, resulting as they did in the injury alleged by the plaintiff, constitute a sufficient cause of action. And upon this question, upon the principles to which I have referred, I cannot doubt that the plaintiffs are entitled to recover. They were disturbed in the lawful enjoyment of their own property. The defendants, in creating that disturbance, were engaged in unlawful business. The acts of which the plaintiffs complain were clearly within the prohibition of the statute relating to the observance

First Baptist Church in Schenectady v. Sch. & Troy R. R. Co.

of the christian sabbath. (2 R. S. 675, § 70. *Watts v. Van Ness*, 1 Hill, 76.) The plaintiffs sustained pecuniary injury as the result of these unlawful acts of the defendants. In these facts I find all the elements necessary to sustain the action. (*Myers v. Malcom*, 6 Hill, 292. *Fish v. Dodge*, 4 Denio, 311. *Pierce v. Dart*, 7 Cowen, 609. *Crittenden v. Wilson*, 5 Id. 165. See also *Rose v. Groves*, 5 Man. & Granger, 613.) In the latter case, the plaintiff carried on the business of an innkeeper and victualler in a house which communicated with the river Thames by a passage and steps, where persons frequenting the house were accustomed to land from boats. The defendants were mast and block-makers occupying adjoining premises. The case showed that they had placed timbers and spars in the river, in such a manner that, at high water, the access to the plaintiff's house was obstructed. It was shown that the plaintiff's business had fallen off since the obstruction. The question left to the jury was whether the access to the plaintiff's house had in fact been obstructed by the defendants. The jury having found a verdict for the plaintiff, it was held, upon a motion in arrest of judgment, that whether the act complained of was a public nuisance or not, the case disclosed a private injury to the plaintiff sufficient to constitute a cause of action. A similar case is found in *Wilkes v. Hungerford Market Company*, (2 Bing. N. C. 281,) where it was held that a bookseller, having a shop by the side of a public thoroughfare, might maintain an action for the loss he had sustained by the defendant's continuing for an unreasonable time an authorized obstruction. *Elliotson v. Feetham*, (2 Bing. N. C. 134,) was, like that at bar, a case of noisy nuisance. The plaintiff alleged that he was lawfully possessed of a dwelling house, in which he with his family dwelt, and where he exercised and carried on the profession of doctor of medicine and physician, and that the defendant being possessed of a certain manufactory for the working of iron, &c. situate near to his dwelling house, made divers large fires and also divers loud, heavy, jarring, varying, agitating, hammering and battering sounds and noises, whereby the plaintiff and his family were greatly disturbed, &c. and

First Baptist Church in Schenectady v. Sch. & Troy R. R. Co.

by means of which his premises were greatly lessened in value, and he had been prevented from exercising and carrying on his profession in so ample and beneficial a manner as he otherwise might and would have done. Upon demurrer the court directed judgment for the plaintiff. So, in the case of *The Duke of Northumberland v. Clowes*, cited in 3 *Chitty's Blackstone*, 217, note 5, the defendant employed a steam engine in his business, as a printer, which produced a continual noise and vibration in the plaintiff's apartment, which adjoined the premises of the defendant, and it was held to be a nuisance. In *Hight v. Thomas*, (10 *Ad. & Ellis*, 590,) an action was sustained for causing offensive smells upon the defendant's premises which came near to, in and about the plaintiff's dwelling house. *Bliss v. Hall*, (4 *Bing.* 183,) too, was a case of nuisance for carrying on the trade of a candlemaker on premises adjoining the dwelling of the plaintiff. The defendant pleaded that he had carried on the business in the same place for three years before the plaintiff became possessed of his messuage. Upon demurrer Vaughan J. said, "The smells and noises of which the plaintiff complains are not hallowed by prescription." And Bosanquet, J. said, "The defendant has, prima facie, a right to enjoy his property in a way not injurious to his neighbor; but here, on his own showing, the business he carries on is offensive, and he makes out no title to persist in the annoyance." (*See also Rex v. Neil*, 2 *Carr. & Payne*, 483.)

The defendants insist that, as the evidence of injury related solely to the use of the plaintiffs' house as a place of public worship, it did not entitle the plaintiffs, as a corporation, to maintain the action. It is true that the evidence only shows that by reason of the acts complained of, the plaintiffs' house is less valuable for the purposes of a house of public worship. It does not appear that its value would be equally depreciated for any other object; nor, indeed, but that it might be devoted to some purpose for which the defendants' noises would not render it less fit. But this, I apprehend, is not necessary. So far as proof of injury is required, it is enough to show that the property has been rendered less valuable for the purposes to which the

First Baptist Church in Schenectady v. Sch. & Troy R. R. Co.

owner has seen fit to devote it. As well might the plaintiff in *Fish v. Dodge* have been required to show that her boarding house could not be used in some other way, so that the noise and smoke of the defendants would have been less annoying. But in that case it was considered enough that the plaintiff had shown that the defendants had so conducted their business, lawful in itself, that it had proved a great annoyance to the plaintiff. "It is enough," said Chief Justice Bronson, quoting the language of Lord Mansfield, "that the enjoyment of life and property has been rendered uncomfortable."

The case of *Squier v. Gould*, (14 Wend. 159,) upon which the defendants' counsel relied, does not, I think, sustain his position. In that case the action was brought by the owner of a store. The act complained of was the placing of sand, lime and other building materials, in the highway, so as to interrupt a free passage to the plaintiff's store, and so that the dirt and dust blew into the store and greatly incommoded and injured the plaintiff and damaged his goods and premises. On the trial the proof was that the store was in fact occupied by a tenant of the plaintiff, and that in consequence of the annoyance complained of, customers were prevented from resorting to the store, and the tenant abandoned it, and that it remained unoccupied. The suit was brought in a justice's court, where the plaintiff recovered. It was reversed, on the ground that the evidence of injury sustained by the tenant and the loss of customers by him, was inadmissible. It is clearly to be inferred from the opinion in that case, that if the plaintiff had declared for the loss of his tenant, and the consequent loss of his rent—or if the tenant had brought his action, and had declared for the injury of his goods and the loss of his customers, either, and perhaps both actions, might have been maintained. The defendants' counsel contends that it was the individuals who assembled at the plaintiffs' house for worship, and not the corporation owning the house, who were annoyed by the defendants' noise, and therefore that these individuals, and not the corporation, should have been plaintiffs in the action. To make the case of *Squier v. Gould* an authority to sustain this posi-

First Baptist Church in Schenectady v. Sch. & Troy R. R. Co.

tion, it should have been held that the customers who would have resorted to the store, but for the nuisance, and not the owner or tenant, should have brought the action.

In *Owen v. Henman*, (1 *Watts & Serg.* 548,) an action was conceived upon the principle contended for by the defendants' counsel. In that case the plaintiff alleged that he was a member of the congregation of the Old Presbyterian Church of Wysox, and as such had a right to sit in their house of worship, and to hear divine service, and exercise religious worship therein, and that the defendant, by making a loud noise in talking, singing and reading, unlawfully disturbed him in the hearing of the preaching of a certain clergyman, in so ample and beneficial a manner as he was entitled to do. The opinion of the court was delivered by Justice Sergeant. He says, "the injury alleged is not the ground of an action. The plaintiff claims no right in the building, or any pew in it, which has been invaded. There is no damage to his property, health, reputation or person. He is disturbed in listening to a sermon, by noises. Could an action be brought by every person whose mind or feelings were disturbed in listening to a discourse or any other mental exercise, and it must be the same whether in a church or elsewhere, by the noises voluntary or involuntary of others, the field of litigation would be extended beyond endurance." And in conclusion he says, "the injury complained of, if against the will of the officers of the church, is *in the nature of a nuisance, or injury to them, and it is for them to seek redress.*" "It is well known," he further adds, "that the property of our churches and meeting houses, and the superintendence of the congregations, and the right to control and regulate them, and to prevent improper intrusion or interference, by suit or otherwise, is uniformly vested in some corporation or trustees, in whom is placed the power to enforce the will of the owners. It is for them to bring actions of trespass, or on the case, to regulate the affairs of churches, and to protect the members in the enjoyment of their religious rights and property."

And I think it equally clear, that the action is properly brought against the defendants. It was, indeed, once supposed,

First Baptist Church in Schenectady v. Sch. & Troy R. R. Co.

that an action for a tort would not lie against a corporation. The argument by which this doctrine was maintained was plausible, though specious. A corporation, it was said, cannot be invested with authority to commit a tort. It acts only through individuals, as agents, and when those who act for the corporation transcend its corporate powers, they, and not the corporation, must answer for it. By the same course of fallacious reasoning it was also held that a corporation could not make a binding contract except by writing, under its corporate seal. I have just had occasion in *The Trustees of St. Mary's Church v. Cagger*, to refer to the change of the rule of law in this respect. It is equally changed in respect to wrongs. The same rule is now applied to corporations, as to individuals. The act of the agent is the act of the principal, as much in one case as in the other. A corporation will be liable for an injury done by its servants, if, under like circumstances an individual would be responsible. (*The Chesnut Hill and Spring House Turnpike Company v. Rutter*, 4 Serg. & Rawle, 6. *The Seneca Road Company v. The Auburn and Rochester Rail-Road Company*, 5 Hill, 170. *The Rector, &c. of the Church of the Ascension v. Buckhart*, 3 Id. 193.) In the latter case the sole point was, whether a special action on the case for an injury could be maintained against a corporation.

We have then, in the case under consideration, a wrongful act committed by the servants of the defendants, while engaged in their business, and for which the defendants may be sued. We have also an injury resulting from that wrongful act to the plaintiffs, for which they have the right to claim redress in an action on the case. This is all that is requisite to sustain this suit. The motion for a new trial must therefore be denied.

Renssellaer Junr. Harris, Watson
 SAME TERM. *Before the same Justices. Parker J.*

CAMP vs. PULVER.

If a contract of sale is void for the fraud of the vendor, the purchaser may maintain an action to recover the value of property delivered in part performance of it.

In such a case, the property being wrongfully obtained, the purchaser may maintain trover for it, or, waiving the tort, he may maintain an action of assumpsit to recover the value of the property.

Upon the trial of such an action it is proper to show the circumstances under which the goods came into the defendant's possession; and for that purpose, to prove the contract, and the delivery of the goods in performance of it, and then to give evidence of the fraud upon which the plaintiff relies to avoid the contract.

To sustain an action to recover the consideration paid by the plaintiff upon the purchase of land, on the ground of fraud in the vendor, it must satisfactorily appear that the defendant, in making the contract of sale misrepresented some material fact affecting his title, or that he intentionally concealed some such fact from the knowledge of the purchaser.

If there is any evidence showing such misrepresentation, or concealment, a report of referees will not be disturbed upon that ground, whatever may be the opinion of the court as to the weight of such evidence. *Per HARRIS, P. J.*

The court will not determine the question whether a new trial should be granted, on the ground that the testimony of an interested witness has been received, when, under the existing law, no objection would lie to the competency of the same witness upon a new trial.

A forfeiture incurred by a tenant, in cutting and removing wood and timber, will be waived by the landlord's subsequently receiving rent from him. *Per HARRIS, P. J.*

MOTION to set aside report of referees. On the 24th of October, 1842, an agreement in writing and under seal was entered into, between the parties to this suit, whereby the defendant agreed to sell to the plaintiff a farm in the town of Ghent, containing 175½ acres, at \$70 per acre, subject to a deduction of \$142,50; a quit-claim deed, with covenants against his own acts, was to be executed by the defendant on the 15th of December following. The farm was encumbered by two mortgages amounting to \$5000 besides interest, the payment of which was to be assumed by the plaintiff as a part of the purchase money. The plaintiff was also, at the same time, to con-

Camp v. Pulver.

vey to the defendant 640 acres of land in Michigan at \$5 per acre on account of the purchase money. The plaintiff, in further payment for the farm, sold and delivered to the defendant a quantity of wheat and other personal property amounting to about \$1500. The balance of the purchase money was to be paid in annual instalments of \$500 each, with interest. The defendant guarantied that the annual rent reserved on the farm, did not exceed \$20, and in case it should, the plaintiff was to have a proper deduction, for the excess, made from the purchase money.

Before the deeds were executed in pursuance of the contract, the plaintiff refused to perform the agreement, on the ground that he had been induced to enter into the agreement by the defendant's fraud, and that he was therefore not bound to perform it; and in February, 1843, he commenced this suit to recover the value of the personal property he had delivered to the defendant in part payment for the farm. The declaration contained a count for goods sold and delivered, and the common money counts. The defendant pleaded the general issue; and, the cause having been referred, the referees made a report in favor of the plaintiff, in May, 1846, which was set aside by the late supreme court in October, 1847. The cause was again heard by the referees, who, on the 15th of June, 1848, made another report in favor of the plaintiff for \$1977,64, which report the defendant moved to set aside. The grounds upon which he relied sufficiently appear in the opinion of the court.

H. Hogeboom, for the plaintiff.

J. C. Newkirk, for the defendant.

By the Court, HARRIS, P. J. If the contract was in fact void for the defendant's fraud, there can be no doubt of the plaintiff's right to maintain an action to recover the value of the property delivered in part performance of it. The goods were wrongfully obtained, and he might have maintained trover for them; or, waiving the tort, he may maintain an action like this, to

Camp v. Pulver.

recover what the goods were worth. Upon the trial of such an action, it is proper to show the circumstances under which the goods came into the defendant's possession; and for that purpose to prove the contract, and the delivery of the goods in performance of it, and then the fraud upon which the plaintiff relies to avoid it. The referees were right, therefore, in allowing the plaintiff to prove the contract and then to give evidence tending to show that it was in fact void for fraud.

I think, too, that the witness Stever was competent. It is true, that at the time he was offered, it had been proved that, as the partner of the plaintiff, he was a joint owner with him of the property for which the suit was brought. This fact might, if it should not have the effect of defeating the action altogether, have entitled him to a share of whatever might be collected of the defendant. But whatever interest he may otherwise have had was discharged by the releases executed by himself and the plaintiff. He thereby surrendered to the plaintiff all right he might have had to claim of the plaintiff a share of the recovery. The objection that he was interested, was thereby removed; and, in respect to the guaranty, as the evidence stood when the witness was offered, he was not liable upon it at all. The guaranty is that all the wheat mentioned in the contract, when mixed, one bushel thereof with five bushels of sound and perfect wheat, shall make superfine flour. It is signed "Camp & Stever;" but Mr. Monell, who drew the papers, states that "the guaranty was signed by the plaintiff, and that Stever was not present." There is no evidence that Stever ever assented to it, and without such evidence, he probably would not be liable upon it. But, however that may be, the indemnity executed by the plaintiff restored his competency. It is not necessary, therefore, to determine whether a new trial should be granted, on the ground that the testimony of an interested witness has been received, when under the present law no objection would lie to the competency of the same witness upon a new trial.

The objection that Stever should have been joined as a plaintiff cannot be sustained. The question was determined by the

Camp v. Pulver.

court upon the application to set aside the first report of the referees. The decision was clearly right. Though the property, up to the time of the transaction, was owned by Camp & Stever yet it was sold by the plaintiff alone, on his individual account, with the consent of Stever, and purchased by the defendant as the plaintiff's individual property. Whether the plaintiff, in his transactions with the defendant, should lose the property or not, he had become liable to account for it with his partner. As between him and the partnership, he had become individually the purchaser of the property from the firm.

The defendant held his title to the farm he had agreed to sell to the plaintiff under a lease in perpetuity executed by James Van Rensselaer to John G. Tator. The lease contained the usual reservation of quarter sales, and also a covenant against waste. The farm was conveyed to the defendant, by a son of John G. Tator, in the spring of 1838. In the winter following, the defendant sold the farm to Philip P. Pulver, and in the fall of 1842, Philip P. Pulver conveyed the farm back to the defendant. During the time he held the title, Philip P. Pulver had in his possession the Van Rensselaer lease. The ground upon which the plaintiff sought to avoid the contract was that the defendant had fraudulently concealed from him the fact that the farm was subject to quarter sales, and the covenant against waste. Upon the trial, Philip P. Pulver was asked by the defendant's counsel, whether, while he had the lease in his possession, he had read the whole of it, and also whether he knew of the covenant in the lease against carrying away timber. These questions were objected to, and the testimony was excluded by the referees. The defendant's counsel contends that the evidence was admissible to rebut the inference that because the defendant had had the lease in his possession, he must have known its contents. But I think the referees decided correctly in excluding the evidence. Whether or not Philip P. Pulver had read the lease, or knew what covenants it contained, could have no legitimate bearing upon the question whether the defendant himself, at the time he made the contract with the plaintiff, knew of these provisions in the lease

Camp v. Pulver.

and fraudulently concealed them. Because another person had not informed himself of the contents of the lease when he might, it could not properly be inferred that the defendant had not done so.

I think, too, the referees properly admitted the testimony of Mr. Monell, by whom the contract of the 24th of October, 1842, was drawn, and also the testimony of Joseph D. Monell to show that when the contract was executed nothing was said about quarter sales, and that subsequently the plaintiff did not inquire of him for a release or any other paper relating to the quarter sales. The evidence was proper to repel any presumption which might possibly be drawn from the other evidence in the case,^a that the plaintiff was not himself ignorant of this charge upon the farm when he purchased.

It was insisted, upon the trial, on the part of the defendant, as one ground of defence, that the farm was not in fact subject to quarter sales; that reservation in the lease having been released by Van Rensselaer, the original lessor. With a view to show that the quarter sales had not been released, and also as tending to show the defendant's knowledge of the existence of such a charge upon the farm, when he made the sale, the plaintiff offered in evidence an agreement executed by John Watts De Peyster, who then claimed to be entitled to the reservations in the lease executed on the 27th of February, 1843, whereby, in consideration of \$700 he agreed to release to the defendant "the quarter sales and all future rights to quarter sales," upon the farm in question. This agreement contained a clause in the following words: "It is understood that in case of its being determined finally, that my title to such quarter sales is not good, then I am to refund the \$700 without interest." The referees properly received this evidence. It tended to rebut the position assumed by the defendant, that the quarter sales had been released. It was also pertinent to the question whether at the time the defendant sold the farm to the plaintiff he knew that the lease under which he held the farm contained such a reservation. For the same reason the testimony of De Peyster and his counsel, Mr. Livingston, was

Camp v. Pulver.

properly received. The declarations of the defendant and his counsel, when negotiating with De Peyster and his counsel, were competent evidence, as bearing upon the questions at issue between the parties. The plaintiff had a right to show, if he could, by the testimony of these witnesses, that when the defendant applied for the release of the quarter sales, he admitted, or did not deny, the existence of such a charge upon the farm. But it was equally proper that the defendant should be allowed to show what he could to rebut the testimony which had thus been received on the part of the plaintiff. It had been proved by De Peyster and Livingston that when the agreement of the 27th of February was executed, it was not pretended that a release of the quarter sales had before been executed, and that the last clause in that agreement related to the litigation then pending between Van Rensselaer and De Peyster in reference to the reservations in that and other leases upon the same tract of land, and not to the execution of any former release. To countervail the effect of this evidence, the defendant offered to prove that on the day the agreement was executed by De Peyster, and before it was executed, the defendant and his counsel called on Ambrose L. Jordan, who was the counsel of De Peyster, and with whom De Peyster at the same time consulted on the subject of the release, and that it was then stated by them, that the plaintiff and defendant had made a contract for the sale of the farm, and that the plaintiff had refused to take the farm, on the ground that it was charged with quarter sales; that as they understood it, the quarter sales had been released, but the release could not be found, and they wished to obtain another release with a view to take from the plaintiff all excuse for not executing his contract, as it was a good sale for the defendant; and that thereupon Mr. Jordan advised that De Peyster should agree to refund the money to be paid for the release, in case it should turn out that there was another release. This evidence was improperly excluded by the referees. It was not only pertinent, but material evidence for the defendant, as the testimony then stood. Whether De Peyster was present or not when these statements

Camp v. Pulver.

were made to Mr. Jordan, the testimony was admissible. The defendant's statements upon the occasion of procuring the release had been proved by the plaintiff, as tending to convict him of a fraudulent concealment of a material fact, when he made the contract with the plaintiff for the sale of the farm. It was important to the defendant that he should be allowed to show other statements made by him upon the same occasion, which might have the effect to overcome the testimony already given, and satisfy the referees that when he made the sale he acted honestly. The testimony he offered tended to that result and should therefore have been received.

I think, too, the defendant should have been allowed to show that he had, during the summer or autumn of 1843, paid up the rent upon the farm. One ground upon which the plaintiff claimed to be exonerated from the performance of his contract for the purchase was, that the title had been forfeited by committing waste upon the land, in violation of the conditions of the lease. There was evidence to show that wood and timber had been occasionally cut and removed from the farm for many years, whereby a technical forfeiture might possibly have accrued. Such forfeiture would be waived by the landlord's receiving rent. It was competent for the defendant to prove that, notwithstanding the violation of the provisions of the lease in this respect, the landlord had received his rent. It was relevant, as tending to show that this objection to the defendant's title to the farm was unfounded.

Upon these grounds the report must be set aside. But upon the merits also, the case is, in my judgment, with the defendant. I have diligently, and again and again perused the entire mass of evidence presented in the case, and have been unable to find sufficient evidence to justify the referees in finding the contract of the 24th of October void, for the defendant's fraud. There is no evidence whatever of the negotiation which resulted in the agreement for a sale and purchase of the farm, or what was said by either upon that occasion. The first information we have of the transaction, is when the parties met at Hudson to have their contract reduced to writing, and

Camp v. Pulver.

the only statement then made by the defendant which is relied upon to establish fraud is, that there was no difficulty in respect to his title. It is not easy to believe that the plaintiff was ignorant of the nature of the tenure under which the farm was held. Such tenures were very prevalent in most parts of the county and in the very neighborhood where this farm was situated. It is notorious that their objectionable features were then the subject of much public discussion and general complaint. The plaintiff had before purchased another farm adjoining that in question, and which was held under a similar title. To say that under such circumstances, the plaintiff made the contract of the 24th of October, without inquiring as to the conditions and reservations contained in the lease, and in utter ignorance of the quarter sale charge upon the farm, is to deny him the exercise of ordinary intelligence and prudence. To sustain this action it should satisfactorily appear that the defendant, in making the contract for the sale of the farm, misrepresented some material fact affecting his title, or that he intentionally concealed from the knowledge of the plaintiff some such fact. If there were any evidence showing such misrepresentation or concealment, the report should not be disturbed upon that ground, whatever might be our opinion as to the weight of such evidence. But I am constrained to say, that I do not find in the case any proof to warrant the decision of the referees. For this reason also the report is wrong, and the motion to set it aside must be granted.

PARKER, J. dissented.

NEW-YORK SPECIAL TERM, November, 1848. *Edmonds,*
Justice.

TUCKER vs. TUCKER and others.

A testator, by his will executed in August, 1838, devised to his widow the use, rent and income of his dwelling house during life, or widowhood, and \$1500 a year which he charged on certain parts of his real estate. He devised to John and William, sons of his son Moses, two houses and lots in C. street during their joint lives, and if either should die without issue then to the survivor for life. Upon the death of either or both leaving issue, then to such issue, and their heirs and assigns forever, so much of the said houses and lots as their father had a life estate in, while living. Upon the death of both, only one leaving issue, then both houses in fee to such issue. But in case of the death of both without issue, then a devise over to his children George, Mary, Sarah and Charles. To G. and J., sons of his son John, he devised two other houses and lots, with remainders limited over in the same manner. To his four children, George, Mary, Sarah and Charles, he devised four houses and lots in fee; but neither was to have possession until a year after the widow's death or marriage. The executors were authorized to rent and lease houses and lands, to make repairs, to pay taxes and assessments, to effect insurance, and to cause all surplus moneys over the uses specified in the will, to be paid to four of the testator's children. And the testator devised the residue of his estate to four of his children and to their heirs, and the survivor, if any of them should die without issue. By a codicil, the testator afterwards revoked the devises to C., one of his four children, and devised all that portion of his estate to his son George, in trust to receive his share of the personal estate and the rents of the real estate, and apply the same to C.'s use during life; and upon his death leaving children, in trust to convey said share in fee to such children; and in case of his death without children, then to convey in fee to C.'s heirs at law. On a bill by the children of the testator's son John, to set aside the will, on the ground that it created unlawful trusts, and suspended the power of alienation to an extent not warranted by law;

Held that the remainders over to George, in trust for C. for life, in the houses and lots devised to John and William, and to G. and J., were void. That the testator died intestate as to the rents and profits of the houses and lots devised to George in his own right and as trustee for C., to Mary, Sarah, John and William, and to J. and G. from the testator's death till the expiration of one year after the widow's death or marriage. And that all the residue of the will and codicil were legal and valid.

How far the failure of part of a will creating a trust estate, by reason of the illegality of a portion of the trusts, affects other parts confessedly legal.

Tucker v. Tucker.

IN EQUITY. On the 8th of August, 1838, Gideon Tucker made his will to pass real and personal estate, in which he devised to his widow the use, rent and income of his dwelling house during life or widowhood, and \$1500 a year which he charged on his real estate in White and Chappel streets, in the city of New-York. He devised to John and William, sons of his son Moses, two houses and lots in Chappel-street during their joint lives, and if either died without issue, then to the survivor for life. Upon the death of either or both leaving issue, then to such issue and their heirs and assigns forever, so much of the said houses and lots as their father had a life estate in, while living. Upon the death of both, only one leaving issue, then both houses in fee to such issue. But in case of the death of both without issue, then a devise over to his children, George, Mary, Sarah and Charles, as afterwards mentioned. To Gideon and Joseph, sons of his son John, he devised two other houses and lots with remainders limited over in the same manner. To his four children, George, Mary, Sarah and Charles, he devised four houses and lots in fee; but neither was to have possession until a year after his wife's death or marriage. His executors were authorized to rent and lease houses and lands, to make repairs, to pay taxes and assessments, effect insurance, and to cause all surplus moneys over the uses specified in the will to be paid to four of his children. And he devised the residue of his estate, "all his estate real and personal, not otherwise disposed of," to four of his children and to their heirs, and the survivor, if any of them should die without issue. One of the four children of the testator was his son Charles, and by a codicil dated 21st November, 1844, the testator, by reason of the incapacity of Charles, revoked the devise to him and devised all that portion of his estate to his son George, in trust to receive his share of his personal estate and the rents of the real estate, and apply the same to his use during life; and upon his death leaving children, in trust to convey said share in fee to such children, and in case of his death without children, then to convey in fee to the heirs at law of Charles. The testator died 23d April, 1845, leaving his widow

Tucker v. Tucker.

and six children and the plaintiffs, children of his deceased son John, as his only heirs at law and next of kin. The bill of complaint was filed to set aside the will, on the ground that it created unlawful trusts, and suspended the power of alienation to an extent not warranted by law. Charles Tucker put in an answer setting up that the codicil was procured by undue influence and was void because it created unlawful trusts. The other defendants answered denying the undue influence, and claiming that the will and codicil were valid.

C. O'Connor & F. B. Cutting, for the plaintiffs.

J. S. Woodward & M. S. Bidwell, for the defendants.

J. H. Lee, for the guardian ad litem of the infant defendants.

EDMONDS, J. There are two trusts created by this will. *First*. That to the executors, to exchange, sell and convey gores of land to straighten lines; to rent and lease houses and collect rents; to repair; to pay taxes and assessments; to effect insurance, and to pay over the surplus to the devisees thereof. This is to continue until the death or marriage of the widow, and for one year thereafter. This is a trust, in its very nature, and vests the estate in the trustees, because it is to receive rents and profits. It is inalienable, because under our statute neither the trustees nor the *cestuis que trust* can convey. And it is illegal, because the power of alienation being thus suspended for a certain and definite period, may be suspended for more than two lives in being; and because the other purposes of it are not those for which an express trust may be created under our statute, (1 R. S. 728, § 55.) *Second*. The other trust is that for the benefit of Charles, whereby, in case of the death of John and William without children, or of Gideon and Joseph without children, his share of the estate devised to them, will be to his trustee for life, with remainder over to his children or heirs. This trust is all legal except only that part which relates to his remainder over, after the death of John and Wil-

Tucker v. Tucker.

liam, and of Gideon and Joseph. As to that, it is illegal, because it will suspend the power of alienation in it for more than two lives in being.

One of these trusts being thus void in whole, and the other in part only, the question that is raised by this bill is, how far that affects the other devises in the will?

The first devise is to the wife of the testator, of household furniture, the use, rent and income of his homestead during life, and the payment of taxes and assessments upon it, by his executors, out of his estate, and \$1500 a year during her life or widowhood, which is made a charge upon some of the land afterwards specifically devised. There is no part of this devise at all connected with or affected by, the before mentioned trusts, excepting only the payment of taxes and assessments. That may be because it is to be paid by his executors out of his estate; but the annuity is not directed to be paid by the executors, nor otherwise than as it is made a specific charge. The *second* devise is to John and William directly, and not through the intervention of a trust, and is no otherwise affected by the illegal trusts than as the rents and profits are, during the continuance of that to the executors, to be collected by them, and as there is a devise over on the death of John and William without issue. The *third* devise to Gideon and Joseph is in the same position. The *fourth* devise, to George, Mary, and Sarah, of the specific houses and lots, is in all respects unaffected by either of the trusts, except that their rents and profits during the executors' trust are to be collected by them and paid over. The *fifth* and *sixth* devises to the sons, Moses and Henry, are also unaffected by the trusts. The last devise is of the residuum, to four of his children in fee with remainders to the survivors, in case any of them should die without issue. The devise in the codicil, for Charles, I have already spoken of.

Thus it appears that no part of the will is affected by the trusts complained of, except the disposition which the testator made of the rents and profits during the life or widowhood of his wife and for one year thereafter, and the remainders over to Charles in the shares devised to John and William, and to

Tucker v. Tucker.

Gideon and Joseph, and perhaps the direction to pay the taxes and assessments on the homestead, of which I shall have occasion to speak more hereafter.

I have recently had occasion, in the case of *Dupre v. Thompson*,^(a) to consider how far the failure of part of a will or conveyance creating a trust estate affects other parts confessedly legal. And I cannot do better than to refer to the observations made by me in that case. To those remarks I have but to add a reference to the provision of the statute, that in the construction of every instrument or conveyance, or authorizing the creation or conveyance of any estate or interest in lands, it shall be the duty of courts of justice to carry into effect the intent of the parties, so far as such intent can be collected from the whole instrument and is consistent with the rules of law; (1 R. S. 748, § 2;) and we have the rule which is to guide us in the decision of this case.

The only provision which is not certainly disposed of by these rules is that in respect to the payment of taxes and assessments on the homestead devised to the widow during life or widowhood. And in regard to that, I confess I have been somewhat in doubt.

The direction of the will is that they shall be paid by the executors, "out of the estate;" and I have supposed that as the executors were to receive the rents and profits during the time that such charges were to be paid, it might have been the testator's intention that they should be paid out of such rents and profits. Hence my doubt; because if the trust as to the rents and profits were to fail, the charge upon them might fail also. But it is not clear that such was the intention. The words used, "my estate," are broad enough to comprehend every thing of which the testator died seised; yet there are parts of his estate with which the executors have nothing to do, viz: the widow's life estate and the two farms devised to his sons, Moses and Henry. Then again they are to be paid "by the executors," who, as such, have no estate but the personal property out of which to

(a) 4 Barb. Sup. Court Rep. 279.

Tucker v. Tucker.

pay it. And it is nowhere said that they shall be chargeable on the rents and profits.

On the contrary, it was clearly the intention of the testator that the widow should enjoy the homestead acquitted from such charges, and that the executors should see that it was so done. In the absence of any other provision, it would be clearly the duty of the executors to keep down those charges, out of the personal estate. And I do not find any provision in the whole will, showing a clearly defined intention that it should be otherwise. For aught that I can see, such may have been the intention of the testator, in any event. That is, at all events, too probable to warrant me in declaring that is not so.

The result then, is that the remainders over to George, in trust for Charles, for life in the houses and lots devised to John and William, and to Gideon and Joseph, are void; that the testator died *intestate* as to the rents and profits of the eight houses and lots devised to George in his own right and as trustee for Charles, to Mary, Sarah, John and William, and to Joseph and Gideon, from the testator's death till the expiration of one year after the widow's death or marriage, (*Van Kleeck v. Dutch Church*, 20 Wend. 457; *Kip v. Van Cortland*, 7 Hill, 353;) and that all the residue of the will and codicil is legal and valid.

A decree must be entered accordingly, allowing the respective parties their costs out of the funds in the hands of the executors; the executors to be allowed, in addition, such counsel fee as the taxing officer shall certify to be reasonable.

AT CHAMBERS, December 2, 1848. *Welles, Justice.*

HARRIS vs. PALMER and BUTTERFIELD.

A judgment will not be ordered to be set off against another, on motion, unless it is a judgment which is conclusive upon the defendant therein, and which the plaintiff has a clear right to enforce.

The subject matter of the set-off must be clear and indisputable, and conclusive upon the party, and must have passed the ordeal of a judicial determination, in a case where the court had acquired jurisdiction of the party, either by his appearance, or by personal service of process upon him.

MOTION to set off a judgment. Previous to September, 1845, and in that year, Palmer sold Harris the wood work of a wagon. In September, 1845, Palmer sued out an attachment before a justice, against Harris, which was executed by the defendant Butterfield, a constable, who levied the same by Palmer's direction, on a wagon, the wood work of which was the same above mentioned; and upon return of the attachment, on the 19th of September, 1848, Palmer obtained a judgment against Harris for \$36,26, for a balance due him for the same wood work. The attachment was served personally on Harris. The wagon was sold by virtue of an execution issued on the judgment against Harris, for a sum sufficient to satisfy it. Shortly afterwards, and in September, 1845, Harris sued Palmer and Butterfield before a justice, in an action of trespass for taking the same wagon, and recovered a judgment. Palmer and Butterfield appealed to the court of common pleas of Ontario county, where a judgment was rendered against them for \$104,97 in favor of Harris; upon which, at the time of making this application, an execution was in the hands of the sheriff of Ontario county, and Palmer asked to set off his judgment in the attachment suit against the one in Harris' favor in the common pleas.

John C. Strong, for the motion.

D. Stephenson, opposed.

Harris v. Palmer.

WELLES, J. The judgment sought to be set off was satisfied by the sale of the wagon. But as that satisfaction was produced by the sale of the same property, for the levying upon and sale of which the recovery was had by Harris, Palmer insists that it is in reality no satisfaction. That although his judgment was nominally satisfied, for the time being, yet as a judgment has been recovered against him and the constable, for the value of the property which produced the satisfaction, equity requires that his judgment in the attachment suit should be regarded as still open and unsatisfied, for the purpose of this application, to avoid the unjust result of Harris' getting the pay for his wagon twice; once by way of paying the judgment against him, and once by collecting the judgment in his favor in money, recovered for its value.

The practice of setting off judgments on motions has grown out of the equitable powers of the court, and its equitable jurisdiction over its suitors. In the exercise of those powers the courts have adopted certain rules by which they will be governed. One is that they will not direct a set-off unless the party applying has obtained a judgment; (6 *Cowen*, 598. 10 *Wend.* 615;) and it must be a judgment which is conclusive upon the party. Hence a set-off of a judgment before a justice, obtained upon an attachment, where the defendant did not appear, will be denied; (6 *Cowen*, 598;) though now probably the judgment would be set off, if the attachment was personally served on the defendant. (*Sess. Laws of 1831, ch. 300, §§36, 37, 38, 39.*) The spirit of the rule seems to be, that the subject matter of the set-off must be clear and indisputable, and conclusive upon the party, and must have passed the ordeal of a judicial determination in a case where the court had acquired jurisdiction of the party, either by his appearance or by personal service of process upon him. In the present case the judgment sought to be set off is before a justice of the peace; and upon his docket appears to be, and is in fact satisfied; and I do not see but he would be a trespasser by issuing an execution upon it on which the defendant's property should be taken. If it was in a court of record, perhaps the court would have the power, upon a proper

Harris v. Palmer.

application and sufficient facts appearing, to vacate the satisfaction and order an execution. But no such power resides in a justice's court; and the only way to test the plaintiff's right to enforce the judgment is to bring a new action upon it, when perhaps it would be competent for him, in answer to the proof of satisfaction by the levy and sale, to show the facts which he contends he has established on this motion. (*See Piper v. Elwood*, 4 *Denio*, 165.) If he would not be permitted, or should not be able, to make such proof, then clearly he ought not to be allowed to set it off here; for, as before remarked, the right to set off on motion depends upon the party having a demand in judgment which he has a clear right to enforce.

It does not appear upon what ground Harris recovered the value of the wagon. It must have been that there was something illegal on the part of the plaintiff in the attachment suit; or that Palmer and Butterfield neglected to make the necessary proof of the proceedings on the attachment. We can imagine a variety of reasons, but it is difficult to conjecture how those proceedings could all be regular and legal, and not form a good defence in the other case. Upon the whole, I am constrained to say that as the facts now appear there is too much doubt of the right of Palmer to enforce his judgment, to allow it to be set off against the one in favor of Harris.

The motion is therefore denied; but as the question, in some of its aspects, is somewhat new in practice, no costs are allowed for opposing.

ST. LAWRENCE SPECIAL TERM, December, 1848

Hand, Justice.

MANN vs. FAIRCHILD.

The statute prohibiting the purchase of choses in action by attorneys, &c. for the purpose of bringing suits thereon, does not extend to a purchase made at a judicial sale, and under the direction of an officer of the court.

But where, in a suit to enforce the collection of a claim against the defendant, he pleaded that at the time of the purchase thereof by the plaintiff the latter was a practising attorney, &c. and the partner of the plaintiff's solicitor; and that he purchased such claim with the intent, and for the purpose of bringing a suit thereon, contrary to the form of the statute; and the plaintiff took issue upon the plea, and the truth of the plea was established by the defendant; *Held*, that the plaintiff could not maintain his suit, and the bill was dismissed. Where a plaintiff replies to a plea, he admits its sufficiency; and if the truth of the plea is established the bill will be dismissed.

IN EQUITY. The complainant purchased certain effects of the St. Lawrence Bank, at a receiver's sale, which took place by the order of the chancellor. This was his title to the claim he was endeavoring to enforce by this suit. To the whole of the complainant's bill of complaint the defendant pleaded that the complainant was at the time of said purchase, and had ever since been, a practising attorney, solicitor and counsellor in this court, and a copartner with the solicitor who brought this suit; and that intending to injure, oppress and aggrieve the defendant, he purchased said claim with the intent, and for the purpose of bringing a suit thereon, contrary to the form of the statute, &c. The complainant took issue upon this plea. The proof of the purchase was clear, and that the complainant was then, and still is, an attorney, solicitor and counsellor. One witness also swore that, at the time of the sale, notice was given to the complainant that the bank had no claims against the defendant. This witness further testified, that the complainant had told him that he had the defendant where he wanted him, and if The Farmers' Loan and Trust Company did not put him through, he would. Another witness testified, that after the sale he walked down from the capitol, where it

Mann v. Fairchild.

took place, to the steamboat, with the complainant, and had a conversation with him about the claims he had bid off against the defendant, and he said that he intended to prosecute them, or something to that effect. Another witness testified that in speaking of the defendant, he said, "I have got him where I wanted him, and I will put him through." It seemed, from the proof, that the complainant was acting as an agent of a corporation, but the pleadings averred the subject matter of the suit to be his own.

B. Perkins, for the plaintiff.

Brown & Myers, for the defendant.

HAND, J. On the merits, in my opinion, this case is with the complainant. He purchased the claims on a sale of the effects of an insolvent bank, which sale was made by an officer of the court, (*Edwards on Receivers*, 2,) and in pursuance of its order. I cannot think that the law against attorneys, &c. purchasing *choses* in action (2 R. S. 288, §§ 71, 75,) extends to such cases. The sale is public, and under the supervision of the court, and must be made to close up the concern, and bears no resemblance to those cases where a member of the bar so far forgets his place and duty as to seek for and put in suit contested claims which perhaps would have forever slept, had the parties in interest remained upon equal ground.

But the question at this time is hardly an open one. In *Tuttle v. Jackson*, (6 Wend. 224,) it was held that a sheriff's sale of land did not come within the statute against selling pretended titles. The chancellor there considered it a change of property by operation of law. In *Hall v. Gird*, (7 Hill, 586,) Beardsley, J. thought the statute did not apply to cases in a court of chancery. These cases were in the court for the correction of errors. This last proposition was doubted by the late chancellor, in *Baldwin v. Latson*, (2 Barb. Ch. Rep. 306.) It is enough, however, to say that that was not a judicial sale.

But there is one objection to the complainant's recovery that

 Van Allen v. Mooers.

is insuperable. The allegation in the plea, that the purchase was with intent to injure, oppress, and aggrieve, is not traversable. But the intent to sue, I think, is; and has been proved. To affect the right of recovery in any case the statute requires that the purchase should be with the intent, and for the purpose, of bringing a suit thereon. (2 R. S. 287, § 71.) This is similar to the former statute, and under that it was supposed that the intent was to be shown by a suit actually commenced. (*The People v. Walbridge*, 3 Wend. 129.) The complainant made the purchase of the effects in September, 1846, and this suit must have been commenced as soon as in the early part of 1847. And there is also proof of the complainant's declarations, of his intention to sue the defendant, immediately after the purchase. The plea then is proved; and although it is no defence in substance, yet upon proof of the truth of the defendant's plea to the whole bill, the plaintiff necessarily fails in his suit. The authorities upon this point are abundant and conclusive. (*Mitf. Eq. Pl.* 302. *Hughes v. Blake*, 6 Wheat. 453. *Story's Eq. Pl.* § 697. *Bogardus v. Trinity Church*, 4 Paige, 178, 196. *Dow v. McMichael*, 2 Id. 345. 6 Id. 139, 144. *Fish v. Miller*, 5 Id. 29. 1 Hoff. Ch. Pr. 221. 1 Barb. Ch. Pr. 119.)

The bill must be dismissed with costs.

MONTGOMERY SPECIAL TERM, December, 1848.

Willard, Justice.

VAN ALLEN and wife vs. MOOERS and others.

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A testator, by his will, devised as follows: "The remainder of the wood-land I also give of lot No. 4 to my grand-daughter Maria S. of my daughter J. forty acres of wood land taken off and the remainder supposed to be twenty-five acres of wood land I also bequeath to my grand-daughter of my son George Maria and Catharine included Maria S. Maria V. E., Catharine V. E. my

Van Allen v. Mooers.

grand-daughters I gave the above mentioned to them their heirs and assigns forever." On a petition by Maria S. for a partition of the twenty-five acres of wood land, claiming one-third part thereof, under the will; *Held* that the remainder of the wood lot, after taking out the 40 acres first devised to Maria S. was devised to Maria V. E. and Catharine V., E. and that Maria S. took no part thereof.

Whether an adjective shall refer exclusively to the last preceding antecedent, or may refer also to one or more, further back, depends upon the intent of the writer.

THIS was a petition by Thomas Van Allen and Maria his wife, for the partition of lands situate in the town of Canajoharie, in the county of Montgomery, in which the petitioners, in the right of Mrs. Van Allen, claimed to have an estate of inheritance in one equal undivided third part, under the last will and testament of Rynear R. Van Evera, deceased. And the petitioners alleged in their petition that the other two third parts thereof were owned by the defendants Nathaniel Mooers and Mary Jane his wife, in her right, and Alida Catharine Van Evera, each owning an undivided third part in fee. The defendants put in a plea denying that they held the premises as tenants in common with the petitioners, and insisting that they were the sole owners of the premises in fee, by virtue of the last will of the said Rynear R. Van Evera, deceased. There being no facts in dispute, and the question involved being the legal construction of the said will, the counsel for the respective parties agreed to the following case for the decision of the court, viz: That the testator, Rynear R. Van Evera, departed this life on the 11th day of February, 1844, leaving his last will and testament bearing date December, 21, 1842, duly executed and published to pass real estate, in full force. That by that will, after making a provision for his wife, and bequeathing to the two sons of his son George Rynear his river flats, and a portion of his up-land, and to the children of his daughter Eliza 150 acres of land, he devised as follows: "I also give of lot No. 4 to my grand-daughter Maria Spencer of my daughter Jane forty acres of wood-land taken off and the remainder supposed to be twenty-five acres of wood-land I also bequeath to my grand-daughter of my son George Maria and

Van Allen v. Mooers.

Catharine included Maria Spencer Maria V. Evera Catharine V. Evera my grand-daughters I gave the above mentioned to them their heirs and assigns forever." It was also agreed that the testator died seised and possessed of the premises in question as well as of the other real estate devised by his said will. That the petitioner Maria Van Allen, and the defendants Mary Jane, wife of the defendant Nathaniel Mooers, and Alida Catharine Van Evera were the grand-daughters of said testator, and the same persons named and described in said will as "Maria Spencer and V. Evera and Catharine V. Evera," and that the said Maria Van Allen was the only child of Jane Van Evera, a deceased daughter of the testator, and that "Mary Jane" and "Alida Catharine" were daughters of George Van Evera, the son of the testator. That the said three grand-daughters, at the time of making the will, and at the death of the testator, had no other property than what was given to them by said last will and testament. And it was stipulated that in case the court should be of opinion that by the true construction of said last will and testament, one-third of said premises was devised to said petitioner "Maria," as alleged in the petition, judgment should be given to make partition and to appoint commissioners, &c. as prayed for in said petition. But if, on the contrary, the court should be of the opinion that the premises in question were devised solely to the defendants "Maria V. Evera and Catharine V. Evera," to the exclusion of said petitioner "Maria" therefrom, that judgment should be given in favor of the defendants, with costs, according to law.

Chas. Sacia, for the petitioners.

H. Loucks, for the defendants.

WILLARD, J. The testator intended to divide the wood lot, mentioned in the will as No. 4, between his three grand-daughters, so that Maria Spencer who represented the testator's deceased daughter Jane, should take forty acres in fee and in severalty, and the other two grand-daughters Maria and Cath-

Van Allen v. Mooers.

arine, representing the testator's son George, should take the remainder in fee and as tenants in common as between themselves. The doubt which has been raised as to the true construction of the devise arises from the words in the paragraph beginning with the word "included." The complainant contends that these words control the prior devise to Maria and Catharine, of the residue, and give it to the three granddaughters in fee, as tenants in common. I think this is not the true construction of the will. The words "above mentioned" in the clause under discussion, refer to the wood lot above mentioned, the entire subject of the devise, and not to that part of it above, which remains after taking off the forty acres devised to Maria Spencer. Whether an adjective shall refer exclusively to the last preceding antecedent, or may refer also to one, or more, further back, depends upon the intent of the writer. In this case, the natural sense of the passage requires the adjective to refer to both devises. Such too, is the grammatical construction of the sentence. (*See the case of Areson v. Areson*, 3 Denio, 458, *in the court of errors*.) The part of a sentence in the words "included Maria Spencer, Maria V. Evera and Catharine V. Evera my granddaughters, I gave the above mentioned to them, their heirs and assigns forever," must be construed distributively; and it thus means, that the portion given to Maria Spencer is given to her and her heirs and assigns forever, and the portion given to Maria and Catharine is given to them and their heirs and assigns forever. It was probably added by the testator by way of caution, to denote the quantity of interest which each devisee took under the will. The testator may not have been aware that by the revised statutes, (1 R. S. 748, § 1,) the preceding words carried the fee to the devisees. And it is observable that in every other part of the will, in which he devises real estate, he adds the usual words of inheritance, showing beyond controversy, that he intended the devisees should take in fee.

The latter member of the sentence from the words "included" must be construed by itself. It cannot, without violence, be connected with the preceding matter. It is absurd to sup-

Van Allen v. Mooers.

pose that while giving a part of a wood lot to his grand-daughters, the daughters of his son George, he should include under the same description, his grand-daughter Maria A. Spencer, to whom he had in the same sentence, devised the other portion of the lot, describing her as the daughter of his daughter Jane. When read by itself, it simply means that he had given the whole lot to his three grand-daughters, their heirs and assigns forever, in the proportions before expressed. This will thus interpreted, is consistent in all its parts, judicious in its provisions and consonant with the testator's affections and social duties. The testator never had but three children, two daughters and a son. Both the daughters were dead when the will was made. The children of his daughter Eliza were provided for by the devise to them of a farm of one hundred and fifty acres. The grand-son of the testator by his son George, took another farm and the stock. Thus, all the grand-children were provided for but Maria Spencer, the daughter of the testator's daughter Jane, and Maria and Catharine, the daughters of George. To these he gave the wood lot in the manner which has been stated. Throughout the will, the testator kept each branch of his descendants separate. In no instance has he connected the branches of different families, in the same legacy, unless the case in question be an exception. In my judgment, it would do violence to the language to suppose that the testator intended to connect them in this instance.

Being therefore of opinion, that the testator devised the premises mentioned in the petition to the defendants Maria and Catharine alone, there must be judgment for the defendants, according to the terms of the stipulation, with costs.

Note. The above decision was affirmed on appeal, at a general term of the court, held in the county of Clinton, on the first Monday of July, 1849, by Justices Paige, Willard and Hand.

NEW-YORK SPECIAL TERM, December, 1848.

Edmonds, Justice.

FLYNN *vs.* STOUGHTON.

The privilege of a foreign consul to be exempt from the jurisdiction of state tribunals, must be asserted in due time; and may be waived by a plea to the merits.

After a defendant has pleaded to the merits, and a verdict has been rendered against him, he cannot avail himself of his privilege as a foreign consul, by affidavit, upon a special motion.

THIS was an action of assumpsit, commenced by the filing and service of a declaration, for work and labor, to which the defendant pleaded only non-assumpsit. An inquest having been taken at the Kings circuit, a motion was now made to set aside the same for irregularity, and to quash all the proceedings in the suit, on an affidavit of the defendant that he was, at the commencement of the suit, and is now, Spanish consul for the port of New-York.

P. W. Turney, for the defendant, cited *Laws of the U. S. of 1789*, § 9; 1 *Binney*, 138; *Davis v. Packard*, (6 *Peters*, 45; *S. C.* 7 *Id.* 276.)

T. L. Danaher, contra, cited *Davis v. Packard*, (6 *Wend.* 327; *S. C.* 10 *Id.* 50.)

EDMONDS, J. The defendant, after having pleaded to the merits, and after a verdict has been rendered against him, seeks to avoid the jurisdiction of this court on a special motion and on a suggestion contained in affidavits, which do not form any part of the record. In *Davis v. Packard*, (6 *Wend.* 333,) our court of errors say, if the court has general jurisdiction over the subject matter, and the defendant has some privilege which exempts him from the jurisdiction, he may waive that privilege if he chooses to do so, and in a superior court of general juris-

Flynn v. Stoughton.

diction, if he neglects to object and show to the court his particular exemption, by way of a plea in abatement or otherwise, before he has answered as to the merits, he will forever be precluded. By pleading in chief, and thereby calling for a decision of the cause on the merits, the party admits the jurisdiction of the court to make such decision. And in the same case (10 *Wend.* 50,) that court again affirm that doctrine and insist that if the privilege of a public minister is that of his sovereign and therefore cannot be waived, it is confined to ambassadors or other diplomatic agents, and does not apply to consuls or commercial agents.

The supreme court of the United States, in reversing the judgment of the court of errors in that case, did no more than assert that jurisdiction over foreign consuls was vested solely in the federal judiciary by the act of congress. (7 *Peters*, 276. 8 *Id.* 324.) That court does not touch the principle established in our state tribunal of last resort, to which I have already referred. It is therefore left in full force for my governance. Consequently I must hold that the privilege of a foreign consul to be exempt from the jurisdiction of state tribunals, must be asserted in due time, and may be waived by a plea to the merits. The motion to quash the proceedings must therefore be denied; but the inquest must be opened, because it was irregular for the plaintiff to put his cause on the calendar after the term had began, without notice to his adversary. The defendant searched the calendar after the sittings began, and not finding this cause upon it had a right to suppose it would not be called on. To put it upon the calendar after that, and proceed to judgment without notice to him, was an irregularity on the part of the plaintiff for which the verdict must be set aside.

MONROE GENERAL TERM, January, 1849. *Maynard, Welles,
and Selden, Justices.*

THE PEOPLE *vs.* HOVEY.

After the dissolution of a marriage, for adultery, the marriage contract is at an end, and the relation of husband and wife no longer exists between the parties; and if the guilty party marries again, he is not within the penalty of the act against bigamy.

But the second marriage being absolutely prohibited by the 47th section of the act concerning divorce, is punishable as a misdemeanor, under the 45th section of the title of the revised statutes, relative to misdemeanors.

DEMURRER to the plea of the defendant. The defendant was indicted in the county of Monroe, for bigamy. He pleaded to the indictment, admitting both marriages, but setting up in his defence a decree of the court of chancery, dissolving the marriage with his first wife, obtained upon a bill filed by her, charging *him* with adultery. The decree was in the usual form. It dissolved the marriage, and declared "that the parties and *each of them*, are freed from the obligations thereof." It also contained a clause prohibiting the defendant from marrying again. To this plea the district attorney demurred, and the defendant joined in demurrer. The court of oyer and terminer sustained the demurrer, and the cause was brought into this court by writ of error.

W. S. Bishop, (district attorney,) for the people.

J. C. Chumaseo & O. Hastings, for the defendant.

By the Court, SELDEN, J. The question presented is, whether, in case of a dissolution of marriage for adultery, the party charged with the offence, if he or she marries again, is within the penalty of the act against bigamy, (2 R. S. 2d ed. p. 573, § 8.) This section provides that "every person having a husband or wife living, who shall marry any other person," shall be adjudged guilty of bigamy. Can the defendant, after the

The People v. Hovey.

decree dissolving his marriage with his first wife for his own adultery, be said to have had a *wife* living? This is the whole question.

† The terms husband and wife have a very definite and precise meaning. They are descriptive of persons who are connected together by the marriage tie, and are significant of those mutual rights and obligations which flow from the marriage contract. Until those obligations are assumed there is no *wife*, and the term is then applied, not merely to describe a woman who has been married, but as expressive of the relations existing between her and her husband. So long as that relation continues, she is properly a wife; when that ceases, the term is no longer applicable. The decree dissolves the marriage, and declares that each party is freed from its obligations. The marriage contract therefore is at an end: not only the complainant in the chancery suit but the defendant also, is absolved from all the obligations arising out of *that contract*. The relation of the parties, consisting in their mutual rights and duties, no longer exists; and it would seem to follow, that the words husband and wife, used to describe that relation, have ceased to be applicable. Certainly the former *wife*, as to whom the dissolution of the marriage is entirely unlimited, cannot be said after this decree to have had a *husband* living; for she might marry again, and thus, if that were so, have two lawful husbands at the same time. But husband and wife are correlative terms, so defined by lexicographers, which implies that whenever one can be properly applied, there must be a person to whom the corresponding term is applicable. If, therefore, the defendant is no longer the *husband* of his former wife, then she is no longer his *wife*.

It was urged, upon the argument, that while the dissolution of the marriage by the decree was total and absolute on the part of the complainant, it was only partial as to the defendant, who remained subject to a portion of the restraints arising from the marriage contract. In answer to this it may be said, that the obligations of the marriage relation are mutual; that the abrogation of them on one side, necessarily involves their anni-

The People v. Hovey.

hilation upon the other ; and accordingly the decree itself provides, that *each party* is freed from those obligations. The restraint of the defendant as to a second marriage, arises not out of the marriage contract, or from any continuing obligations to his former wife, but exclusively from the positive prohibition of the statute.

This was virtually decided in the case of the *Commonwealth of Mass. v. Putnam*, (1 *Pick.* 36.) The court there held, that under the statute of that state, which is similar to ours, a divorce for adultery was *total* and not partial as to the *guilty party*; and that consequently he no longer could be said to be "a married man" within their statute against adultery ; and although the court there intimated that the defendant might be convicted under the statute of Massachusetts against bigamy, yet it will be observed that in that statute the words "husband and wife" are preceded by the word "former," which is omitted in ours.

Did the section already cited, therefore, stand by itself, unconnected with any other section or statute, I should have little difficulty in coming to the conclusion that this case does not fall within it. But the 3d subdivision of the next section of the act, (2 *R. S. 2d ed. p. 573, § 9*,) provides that section eight shall not extend to any person by reason of any former marriage which shall have been dissolved by the decree of a competent court, for some cause other than the adultery of such person. The district attorney relies upon this subdivision as controlling the construction of the preceding section, and showing that the legislature must have intended that the section in question should extend to cases like the present. The same exception, in substance, is contained in the 4th section of the article on marriage, (*Id. p. 74*,) the object of which is to declare void marriages which the 8th section of the act against polygamy is designed to punish.

It will be observed that the 4th section, here referred to, prefixes the word *former* to the terms husband and wife, while the 8th section of the bigamy act entirely omits it. The 4th section of the article on marriage reads thus : "No second or other subsequent marriage shall be contracted by any person

The People v. Hovey.

during the life of any *former* husband or wife of such person," unless, 1. "The marriage with such former husband or wife shall have been annulled or dissolved for some reason other than the adultery of such person." It is obvious that it is the use of the word *former* in this section, which renders the exception necessary. No one would contend, if that word had been omitted, that the section would include the case excepted. It follows from this, that the only object of inserting the word *former* in this section, must have been to embrace the case of persons divorced for their own adultery. If that word was necessary for that purpose in this section, why was it not equally so in the 8th section of the bigamy act; and what is to be inferred from its omission in the latter?

It was held in *Mosa v. Newman*, (6 Bing. 567,) that when in several statutes *in pari materia*, the legislature is found sometimes omitting and sometimes inserting a clause of relation, it is to be presumed that their attention has been drawn to the point, and that the omission is designed; and in *Rex v. Kone*, (6 East, 518,) Lord Ellenborough, in applying this rule, says: "It seems as if the omission were intentional, but if it were not intended, we can only say of the legislature, *quod voluit non dixit*." It is worthy of remark, too, that the statute against bigamy, passed in the reign of James I. as well as our own statute in existence prior to the passing of the present act, contained the word "former," as a prefix to the terms husband and wife. (1 *Hale's Pleas of the Crown*, 692. 1 *R. L.* 113.) The same is true, as before observed, of the statutes of Massachusetts. (1 *Pick.* 136.) If this does not prove that the word was omitted in our statute, by design, it goes strongly to show that it has heretofore been considered an important and significant word.

Independent therefore of the 3d subdivision of section 9, before referred to, not only the language used in section 8, but its comparison with other statutes *in pari materia*, as well as the history of legislation on the subject, all unite to sustain the construction contended for by the defendant. Should then that subdivision have the effect to extend the provisions of section 8,

The People v. Hovey.

to a case otherwise not within it? This subdivision contains, in form, an exception to the enactment in section 8. The office of an exception is to curtail and limit the operation of the enacting clause, and it could rarely, if ever, be properly regarded as extending it, where the terms of the enactment itself are clear and explicit; although it may be resorted to for the purpose of explaining an enactment otherwise ambiguous. The inference drawn from subdivision 3 of section 9, as to the intention of the legislature, is met by the contrary inference to be derived from the omission of the word *former*, contained in all previous statutes on the same subject.

It is said to be a safe method of interpreting statutes, to give effect to the particular words of the enacting clauses. (*Dwar. on Stat.* 906.) This rule, so salutary in all cases, should be adhered to with peculiar strictness, in cases like the present, upon the familiar principle that statutes which are highly penal in their nature should always be strictly construed *in favorem vitæ et libertatis*.

Independently of the statute against bigamy, our laws impose severe penalties upon the act charged against the defendant in this case. The 4th section of the article on marriage, before referred to, (2 R. S. 2d ed. 74,) makes the marriage void, thus subjecting the offender to the painful consequences of public disgrace, illegitimacy of children, &c. In addition to this, such a marriage being absolutely prohibited by the 47th section of the act concerning divorce, (2 R. S. 2d ed. p. 80,) is punishable as a misdemeanor by the act, 2 R. S. 2d ed. p. 582, § 45.

The defendant, therefore, will not necessarily go unpunished, although he may escape the penalty of the act against bigamy. The judgment of the court of oyer and terminer must be reversed.

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SAME TERM. *Maynard, Johnson, Welles, and Selden,*
Justices.

WILLIAMS vs. HUTCHINSON.

A person is not bound to maintain the child of his wife, by a former husband; nor is he entitled, by law, to claim the services of such child, unless the latter chooses to render them.

But if an individual does in fact support and maintain his step-child in his family, and treats him as a member of it—standing *in loco parentis* to him—under such circumstances the law will not imply a promise to pay for services rendered by the step-child, nor permit a recovery therefor, unless an express promise is shown, or something to prove that such was the expectation, on both sides.

WELLES, J. *dissenting.*

The fact of the step-father's standing *in loco parentis* effectually repels all presumption of service for hire or wages, and renders an express promise indispensable to the maintenance of an action by the step-child. WELLES, J. *dissenting.*

MOTION to set aside report of referees. The action was **assumpsit**, for labor and services. The plaintiff's mother married the defendant when the plaintiff was about nine years of age, and the plaintiff then went to live with the defendant, with his mother. He continued to reside there until he was about seventeen, when he left the defendant, and did not return. While he lived with the defendant he was treated in all respects as a member of his family, was clothed and schooled in the same manner as the defendant's children were, and performed labor suitable for a person of his age and condition. There was no proof of any agreement or understanding that he was to receive wages, and account for his board, schooling and clothing; and no accounts were kept on either side. At the time of the marriage the defendant had six sons, and the plaintiff's mother three. The only evidence on the subject of an undertaking to pay was, that when the plaintiff and another brother were about leaving the defendant, the latter said he did not wish them to leave, and was willing to pay for what they had done. It was a remark made by the defendant in the presence of the plaintiff and his mother and the other members of the family, but

Williams v. Hutchinson.

not addressed to any one in particular. Evidence was given as to the value of the plaintiff's services, over his board, clothing, &c. under objection from the defendant. The referees reported in favor of the plaintiff \$81,81.

E. Van Buren, for the plaintiff.

T. R. Strong, for the defendant.

JOHNSON, J. A person is not bound to maintain the children of his wife by a former husband. (*Gay v. Ballou*, 4 *Wend. Rep.* 403.) Not being bound to provide for them, or furnish them with any support, he is not entitled to their services provided they choose to live elsewhere; and in the latter case he cannot recover for their services, either in his own right or in that of the mother. (*Commonwealth v. Hamilton*, 6 *Mass. Rep.* 273, 275. *Freto v. Brown*, 4 *Id.* 675. *Worcester v. Merchant*, 14 *Pick.* 510.) While the mother remains a widow she is bound to provide for her children, and is entitled to control them while under age, and to collect their earnings while in the service of others. But when she marries, her legal capacity is gone, and she can no longer control the persons, or property, or earnings, of her children.

In this case, there is no evidence of any express promise to pay, and no proof that there was any expectation, on either side, while the services were being performed, that payment was to be made or demanded. The remark proved to have been made by the defendant, as the plaintiff was about leaving, that he did not wish him to leave, and was willing to pay for what he had done, amounts to nothing more than the expression of a willingness, on the defendant's part, to pay the plaintiff for his services if he would stay with him. It furnishes no evidence of any prior understanding or agreement, but, on the contrary, rather rebuts the presumption, as the remark was not particularly addressed to the plaintiff, and no question was raised or suggested by him about any pay. Indeed, there is nothing in the case to show that, up to this time, the plaintiff

Williams v. Hutchinson.

had ever thought of asking pay of the defendant. The case must, therefore, turn entirely upon the question whether, under the circumstances of this case, the law will imply a promise on the part of the defendant. I think there can be no doubt that it will not. It is clear, from the case, that the plaintiff lived with the defendant as a member of his family, in all respects, and was treated by the latter as one of his own children. That although the defendant was not bound to provide for him, or furnish him with any support, and was not entitled by law to claim the plaintiff's services if he had not chosen to render them, yet that he did in fact support and maintain him in his family, and as a member of it, and stood *in loco parentis* to him. The books are full of cases to show that, under such circumstances, the law will not imply a promise to pay for services thus rendered, or permit a recovery, unless an express promise is shown, or something to prove that such was the expectation on both sides. (*Robinson v. Cushman*, 2 Denio, 149. *Andrews and wife v. Foster*, 17 Verm. Rep. 556. *Fitch v. Peckham*, 16 Id. 150. *Swires v. Parsons*, 5 Watts & Serg. 357. *Wiers v. Wiers' adm.* 3 B. Monroe, 645. *Candor's appeal*, 5 Watts & Serg. 513. *Willis v. Dun, Wright*, 134.)

In the case of *Andrews and wife v. Foster*, the plaintiff's wife, who was a niece to the defendant's wife, went to live with the defendant at the age of nine, and lived with and was brought up by him until she came of age, when the defendant told her she was free to go, but if she staid with him he would do well by her. She continued to reside with the family as before, four or five years, when she left; and after her marriage, joined with her husband in an action for her services after she became of age. No accounts were kept, on either side, and no request made for payment when she left. And the court held that she could not recover, as she lived there after, as before, her majority, as a member of the family, the defendant standing *in loco parentis*. That the law would not imply a promise to make a pecuniary compensation under such circumstances.

The argument that the defendant could not lawfully claim the plaintiff's services, and was under no obligation to maintain

Williams v. Hutchinson.

and take care of him as a parent, does not help the plaintiff's claim in this case. The case turns upon different considerations of law and public policy. The defendant voluntarily took upon himself the duties of a parent, and, for aught that appears, discharged them faithfully. The plaintiff accepted the defendant's shelter and protection, and rendered his services and obeyed the defendant's commands, voluntarily, as long as he chose, and no longer. He cannot now be permitted to turn it into a contract and recover, because, forsooth, he may be able to prove that his services were worth something more than his maintenance and support. The relation in which the parties stood, for the time being, forbid it; unless it can be shown that there was an express agreement or definite understanding at the time. Nor is it of the least consequence that the plaintiff was an infant, and incapable of binding himself by any express promise or agreement; as there was nothing of the kind between the parties; and unless the law implies a promise on the part of the defendant, there can be no recovery. And we have seen that, under the circumstances of this case, no promise is implied on his part. The fact of his standing *in loco parentis* effectually repels all presumption of service for hire or wages, and renders an express promise indispensable to the maintenance of the action. (*Chit. on Cont. 5th Am. from 3d Lond. ed.* 148. *Cooker v. Martin*, 4 *East*, 76.) The family relation or compact is not that of service on the one hand, or protection and support on the other, for pecuniary reward. It rests upon a foundation essentially different in all its parts, and is a relation which all just and politic laws should be careful to cherish and protect.

The report of the referees should be set aside.

MAYNARD, P. J. and SELDEN, J. concurred.

WELLS, J. dissenting. It is contended on the part of the defendant, that the plaintiff is not entitled to recover, for the reason, that during the time the services were rendered for which the action is brought, the plaintiff lived with the defendant as

Williams v. Hutchinson.

a member of his family, was clothed and schooled by him, and treated in all respects as he treated his own children; that the defendant stood *in loco parentis* to the plaintiff while the services in question were being rendered, and that it would not be in accordance with the understanding of the parties, and would be against public policy, to allow a recovery under such circumstances.

I have not been able to find a case where this express point has been decided. It has been repeatedly decided, and I think with great propriety, that where parties competent to contract, enter into an arrangement by which one becomes a member of the family of the other, under circumstances to forbid the idea of a promise or contract for pecuniary compensation, no action will lie to recover such compensation for services rendered during the existence of such arrangement, whatever the value of such services may have been. (*Robinson v. Cushman*, 2 Denio, 149. *Andrews and wife v. Foster*, 17 Verm. Rep. 556. *Fitch v. Peckham's Ex'rs*, 16 Id. 150. *Swiss v. Parsons*, 5 Watts & Serg. 357, 513. *Weir v. Weir*, 3 B. Monroe, 645.) In these and all the cases I have met with, the parties to the arrangements out of which the supposed legal liability to pay for the services rendered arose, were adults during the time the services were rendered, and perfectly competent to bind themselves by contract, or to consent to any arrangement upon which the law would imply a contract or agreement to pay, or not to pay, for services rendered, or to waive, either in express terms or by implication, any legal right which would otherwise vest.

In the present case, the plaintiff was a son of the defendant's wife by a former husband; and it is conceded that the defendant was neither bound to support him nor entitled to his services. The services in question were rendered during the plaintiff's minority, and we are to assume they were worth to the defendant the amount which the referees have reported, over and above the value or expense of his boarding, clothing, &c. It would therefore seem, upon plain principles of equity and justice, that the defendant ought to pay this balance—

Williams v. Hutchinson.

Upon what principle should he be excused? He has had the plaintiff's services, and why should he not render an equivalent? The rule of law applicable to the family relation, and to persons standing *in loco parentis*, is invoked in his behalf; and it is said that as no accounts were kept between the parties, and no agreement on the part of the defendant to pay for these services has been proved, no promise to pay, under the circumstances of the case, can be presumed. Even if it were proved that no express promise was made, it does not follow that the law will not imply one. Promises are implied in consequence of the nature of the transaction. An express promise in such a case, is out of the question. It is where there is no express promise that the law will sometimes imply one. When there is an express promise there is no need of an implied one. An implied promise does not mean that an actual express promise is presumed, but that the law will imply, or intend, or assume a promise for the party, where none has been expressly made, in cases where reason and justice dictate that he should do the thing which the law thus implies he has agreed to do.

The rule of law referred to, as applicable to persons standing in the family relation, must be, and I think is, based upon the understanding or agreement of the parties to such arrangement. The arrangement itself is an agreement, and supposes parties capable in law of entering into it. But an infant cannot bind himself by either an express or implied promise or contract. This is the general rule, and I am aware of only one exception to it, and that is, his liability to pay for necessities. This exception cannot aid the defendant, because the referees have allowed his claim for boarding and clothing and schooling, and the amount reported due is only for the excess of the value of the plaintiff's services after deducting such claim of the defendant. The reason why contracts with infants, except for necessities, are void or voidable, is the indulgence the law has seen fit to give them, who are supposed to want judgment and discretion in their contracts and transactions with others, and the care it takes of them in preventing them from being imposed upon or overreached by persons of more years

Williams v. Hutchinson.

and experience. It will not be contended that a valid and binding promise will be implied in the case of an infant, where if the promise had been expressly proved, it would have been void.

If the doctrine in question be applicable to the case of an infant, I do not see but it must cover every imaginable case, where the relationship is once established. There are undoubtedly cases where a young man of sixteen years is capable of doing the labor of a man. Suppose such a case, and where the party takes his position in the family of his employer; makes it his home there as one of the family; is fed and clothed in the same manner, and from the same source, as the employer himself; no agreement made, and no accounts kept; and he serves his employer faithfully for five years and until he becomes of age, and the jury should be of the opinion that his services were worth \$10 a month during the whole time, over and above his clothing and boarding and all other benefits received by him, shall he, by reason of his supposed assent to such family arrangement, be denied when he comes of age, the large balance of \$600 which is justly his due? Suppose in the same case the infant, at the age of twenty, becomes permanently disabled by the loss of a limb or a chronic disease; the other party is not bound to take care of or provide for him a single day, but may leave him to be cared for by public charity; and according to the doctrine contended for, he is not accountable for the \$480 which, at the time the disability commenced, he was in equity and justice bound to pay. The case of an adult is entirely different. His assent to the arrangement might and would be implied.

There are cases holding that a man is liable to strangers for necessities furnished an infant where the former stands *in loco parentis* to the infant, without reference to his legal liability to support him; but they rest upon the ground that the party has suffered the relation to be formed and to continue publicly, and that strangers have a right to infer either such a relation as would constitute a legal liability to support the infant, or an implied authority to the infant to contract in his

Williams v. Hutchinson.

name. In such a case, the party could put an end to his liability to pay for any supplies in future, by dissolving the relation assumed, and turning the infant away.

Gay v. Ballou, (4 *Wend.* 403,) is a strong case in favor of this report. The action was brought to recover for the maintenance of the defendant while an infant, for the period of more than three and an half years, and for necessities furnished during that time. It appeared that the plaintiff married the defendant's mother in December, 1819, when the defendant, being about seventeen years of age, went to reside with the plaintiff, and continued with him until May, 1823, at which time, his mother having shortly before died, he left the plaintiff's house. The cause was tried before referees, who made a report in favor of the plaintiff of \$186,91. The court held that the plaintiff was entitled to recover for the necessities furnished the defendant while an infant and while so residing with him as a part of his family; Sutherland, J. who delivered the opinion, holding that although it was claimed that an express promise had been proved after the defendant became of age, yet that it was unnecessary, for, as the claim was for necessities furnished, he was liable upon an implied promise to pay for them. If the infant's services in that case had been worth more than the necessities furnished, it is difficult to perceive why he would not have been allowed to recover the excess. Indeed I am not able to discover the difference in principle between that case and the present.

Upon the whole, I think the motion to set aside the report of the referees should be denied; and I place my opinion upon the ground of the legal incapacity of the plaintiff, at the time the services were rendered, on account of his non-age, to enter into or give his assent to any agreement which should deprive him, on coming of age, of the right to recover whatever his services were worth, after deducting the defendant's claim for necessities furnished.

Motion to set aside report granted.

MADISON GENERAL TERM, January, 1849. *H. Gray, Mason, and Morehouse, Justices.*

MORRIS vs. FLOYD and others.

If a mortgagor, on being sued at law upon the bond given in connection with the mortgage, interposes a defence, but fails to appear at the trial, and a judgment is recovered against him for the penalty of the bond, that judgment is conclusive upon him, and establishes the validity not only of the bond but of the mortgage given to secure the bond debt. And in a suit to foreclose the mortgage the mortgagor cannot set up the defence attempted to be made in the suit at law upon the bond.

The case of *The Mechanics' Bank v. Edwards*, (1 Barb. Sup. Court Rep. 271,) so far as it decides that usury is a personal defence, and cannot be set up by a stranger to the original transaction, overruled.

A purchaser of mortgaged premises from the mortgagor, who takes the same subject to the lien and payment of the mortgage, acquires the equity of redemption merely, and cannot set up the defence of usury, on a bill to foreclose such mortgage.

And where a junior mortgagee purchased in the mortgaged premises at a sale under a statutory foreclosure of the junior mortgage, and sold them to another for the same amount at which they were purchased by him, and conveyed them to the purchaser by a warranty deed, subject to the prior mortgage; *Held* that unless there was something in the surrounding circumstances to warrant a different conclusion, it must be intended that the grantor meant to convey, and the grantee to receive, a title subject to the payment of the prior mortgage, by the grantee; and that, in a suit to foreclose such mortgage, the grantee could not set up usury in such mortgage, as a defence.

The principle upon which the defence of usury is denied to one who has purchased the mortgaged premises, from the mortgagor, subject to the mortgage, is founded upon the supposition that on the purchase an allowance was made, out of the purchase money, with which to redeem the property purchased, from the incumbrance; and that the purchaser ought not, under such circumstances, to avail himself of a statute not intended for his benefit. *Per H. GRAY, P. J.*

If, in such a case, the premises are worth any considerable amount less than the consideration expressed in the deed and the sum due on the mortgage subject to which they were conveyed, that fact, in connection with the circumstance that the grantor was not the mortgagor, and not benefited by the original loan, might afford ground for believing that the payment of the prior mortgage, by the purchaser, was not contemplated at the time of the sale and purchase. But if the premises are amply sufficient, over and above all they cost the purchaser, to pay the prior mortgage, that fact will go to show that it was the intention of the parties that the property should be conveyed subject to the payment of the mortgage. *Per H. GRAY, P. J.*

Morris v. Floyd.

IN EQUITY. The plaintiff excepted to the answer of the defendants Floyd and Beidleman, and on a reference to a master the exceptions were allowed. On exceptions by the defendants to the master's report, the decision of the master was reversed, by Justice Shankland, at a special term of this court held by him. And from the decision made at the special term, the plaintiff appealed to the general term of the court. The facts are as follows: The plaintiff filed his bill against Floyd, Davis and Jacob Beidleman, to foreclose a mortgage executed by Floyd to Davis for \$4000, and by Davis sold to Morris, the plaintiff, with a guaranty of the payment. The defendants, Floyd and Beidleman, put in a joint answer, setting up the defence of usury, and alleging that Floyd and others, as partners, being pressed for money, applied to the plaintiff for a loan; and that it was then agreed that the bond and mortgage in question should be made by Floyd to Davis, for the purpose of being sold to the plaintiff at a discount of \$400, as a usurious premium; and that it was thus made and sold; that Floyd afterwards mortgaged the same premises, with others, to Henry S. Beidleman, for \$500, who foreclosed the mortgage in 1843, under the statute, and bid in the premises, and afterwards sold them to the defendant Jacob Beidleman, subject to the mortgage to the plaintiff. The deed to Jacob Beidleman was not recorded until after the plaintiff had foreclosed under the statute, in 1846. The plaintiff sued Floyd on the bond, in 1845, and obtained judgment thereon for the amount of the penalty of said bond; but no part thereof had ever been paid, or collected. The plaintiff excepted to the answer as impertinent in several particulars; and the exceptions having been sustained by the master, the defendant excepted to his report as to the first, fourth, fifth, sixth and seventh exceptions. The seventh exception was to all that portion of the answer which set up the defence of usury, and was founded on the statements in the bill and the admission in the answer that judgment had been obtained on the bond against Floyd, and as to the statute foreclosure on the plaintiff's mortgage; and the plaintiff insisted that the defendants were estopped from

Morris v. Floyd.

setting up the usury, or any other defence. And it was further claimed that as the deed from Henry S. Beidleman to Jacob Beidleman was taken subject to the plaintiff's mortgage, Jacob Beidleman could not set up the defence of usury to that mortgage; and also, that as his deed was not recorded at the time Morris commenced foreclosing his mortgage, that foreclosure was good as against him, although notice was not served upon him as a subsequent alienee of the mortgaged premises. The mortgage to Davis was dated October 18th, 1841, and recorded on the same day. On the 25th of October, 1841, it was assigned to the plaintiff, and was foreclosed under the statute, June 25th, 1846. The mortgage from Floyd to H. S. Beidleman, was dated 26th March, 1843, and recorded the same day. It was foreclosed under the statute, on the 26th of June, 1843, and affidavits of sale recorded June 27th, 1843. The deed of warranty, subject to the mortgage for \$4000 given by Floyd to Davis, was acknowledged on the 12th of August, 1843, and recorded April 9th, 1846.

John A. Collier, for the plaintiff.

James Dunn, for the defendants.

By the Court, H. GRAY, P. J. The principal, if not the only question arising upon the exceptions taken to the answer of Floyd and Beidleman, is embraced in the seventh exception, and presents the question whether Floyd and Beidleman can set up usury in the plaintiff's mortgage, as a defence to this suit.

The mortgage in suit is collateral to a bond upon which a judgment in a court of law has been recovered against Floyd. To the declaration upon that bond Floyd interposed the same defence here set up to the mortgage, but failed to appear at the trial, and a verdict was obtained, upon which a judgment was subsequently recovered against him. "It is enough that he had an opportunity of trying the question, and that the matter has been adjudged against him. That judgment is final."

Morris v. Floyd.

(*Norton v. Wood*, 22 *Wend.* 522.) There is no pretence that the defence set up could not have been made available at law in the suit upon the bond, where a judgment was recovered against him, which establishes (beyond his right to question,) the validity not only of the bond, but of the mortgage given to secure the bond debt. But if Beidleman has the right to interpose the defence of usury, that right is a sufficient answer to the objection that it cannot be set up by Floyd, for the reason that the answer is joint, and insisted upon by both defendants. The exception taken is not to the right of Floyd alone to interpose the defence, but to the answer made by them jointly; and if Beidleman has the right to set up such defence the answer ought to stand until final decree, when the rights of the parties can be separately considered and passed upon. The exception as made must be sustained, or entirely overruled. (*Van Rensselaer v. Brown*, 4 *Paige*, 176.) It becomes important, therefore, to consider whether Beidleman can set up the defence of usury. It was claimed on the argument that the defence was personal; and that Beidleman, not being a party to the original contract, could not set up such defence. The only authority cited in support of this proposition, (and I have not been able to find another,) is a decision made at special term in the case of *The Mechanics' Bank v. Edwards*, (1 *Barb. Sup. Court Rep.* 271, 278, 9,) in which the learned justice before whom that cause was heard, decided that usury "is a personal defence and cannot be set up by a stranger to the original transaction," and that under our statutes "it is confined to those persons only who were bound by the original contract to pay the sum borrowed." The authorities referred to and upon which that decision was based, were *Reading v. Weston*, (7 *Cowen*, 432.) *De Wolf v. Johnson*, (10 *Wheat.* 386,) and *Post v. The Bank of Utica*, (7 *Hill*, 391.) If this proposition is sound, and warranted by previous authority, then Beidleman who was not a party to the mortgage in suit, cannot avail himself of the defence set up. But in my judgment the authorities cited do not warrant the conclusion to which the learned justice arrived.

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Morris v. Floyd.

In the case of *Reading v. Weston*, there was no legal privity shown to exist between the party to the usurious contract, and those who sought to set up usury as a defence to it. In the case of *De Wolf v. Johnson*, the question decided was, that the purchaser from a mortgagor, of a mere equity of redemption, could not set up usury as a defence to the mortgage, subject to which he had purchased. And in the case of *Post v. The Bank of Utica*, the only point decided was, that a purchaser under a judgment was not a "borrower" within the meaning of the statutes relating to usury, so as to entitle him to relief in chancery, on a bill filed to set aside a prior mortgage as usurious. In that case, the right of the Bank of Utica to set up usury in the mortgage, when Post should seek to foreclose it upon the premises purchased by them, was not questioned. That question was settled by a previous adjudication upon the same mortgage; (see *Post v. Dart and The Bank of Utica*, 8 *Paige*, 641;) and the doctrine confirmed, that "an usurious security is void, not only against the borrower and his sureties, but also against all persons who claim title under them to the property intended to be affected by the usurious contract." In *Shufelt v. Shufelt*, (9 *Paige*, 145,) Chancellor Walworth says that "in the ordinary case of the giving of an usurious mortgage by the owner of the mortgaged premises, the owner of the premises has the right to sell his property, or to mortgage the same, as though such void mortgage had not existed; and the purchaser in such case necessarily acquires all the right of his vendor to question the validity of the usurious security." And in *Dix v. Van Wyck*, (2 *Hill*, 522,) Bronson, J. in considering who may, and who may not, set up the defence of usury, says, that "a mere stranger, or one who has no legal interest in the question, shall not officiously intermeddle in the matter and take advantage of a statute not made for his benefit; but a creditor who has obtained a judgment and execution cannot be regarded as a mere stranger." And on the same footing stands the mortgagee or grantee of one who has made an usurious mortgage.

But it is insisted that the defendant, Jacob Beidleman, hav-

Morris v. Floyd.

ing purchased the premises of Henry S. Beidleman, subject to the plaintiff's mortgage, cannot set up the defence of usury. If the case of *Floyd v. Scott*, (4 *Peters*, 205,) is to be followed, then the objection, in any view of the case, cannot prevail. The authority of that case would permit the purchaser from a mortgagor of a mere equity of redemption, to set up usury in the mortgage. Such is not the rule established in this state, or in Massachusetts. In *Green v. Kemp*, (13 *Mass. Rep.* 515,) where one Wood, the mortgagor, "demised, released and quit-claimed to Kemp, all the right in equity of redeeming, which he had in the premises," it was held that Kemp could not set up usury in the mortgage previously given by Wood. The court said if he had purchased the land he might have avoided a previous usurious mortgage, but having purchased only the right to redeem, he could not avail himself of usury in the mortgage. In *Badger v. Hubbard*, (15 *Mass. Rep.* 103,) the court affirmed the principle in the case last cited, and say of the case then under consideration, that "it is not unlike the case of a mortgage on which usurious interest is reserved. If the mortgagor in such case conveys the land to a third person, subject to the mortgage, the grantee of this right of redemption cannot question the right of the mortgagee." In *Post v. Dart*, (8 *Paige*, 641,) Chancellor Walworth refers to *Green v. Kemp*, and says, the purchaser "who takes the premises subject to the lien and payment of a mortgage, cannot set up the defence of usury, and thus obtain an interest in the land which the mortgagor never agreed or intended to transfer to him." And in deciding the case of *Shufelt v. Shufelt*, (9 *Paige*, 145,) he says "the mortgagor may, if he thinks proper to do so, elect to affirm the usurious mortgage by selling his property subject to the payment or to the lien of such mortgage, and the purchaser in that case takes the equity of redemption merely, and cannot question the validity of the prior mortgage on the ground of usury." This same principle is reasserted in *Cole v. Savage*, (10 *Paige*, 591.) And in *Ferris v. Crawford*, in the court for the correction of errors, (2 *Denio*, 598,) where the mortgagor sold, and deducted from the price agreed to be paid for the

Morris v. Floyd.

premises, the amount due on the mortgage previously given by him, it was held that the purchaser on a judgment subsequently obtained against the vendees of the mortgaged premises, who had notice that the judgment debtors had only purchased the mere equity of redemption, could not interpose the defence of usury to the mortgage. It must be borne in mind that all the cases where the grantee of mortgaged premises, or those holding under him, have not been permitted the defence of usury to a previous mortgage, are cases of conveyance by the mortgagor, where he himself has either deducted the amount of the mortgage from the price agreed upon for the premises, or has sold, in terms, subject to the mere equity of redeeming them from the lien of the previous mortgage. In such cases the grantee of the mortgagor ought not, upon obvious principles of equity, to set up a defence which his grantor had waived, and by deducting from the price or value of the premises the amount of the previous mortgage, had provided him with the means of payment.

In the case under consideration the premises were not sold by the mortgagor, but by a junior mortgage creditor of the mortgagor, who, under a statute foreclosure, purchased them in and thus succeeded to all the rights of the mortgagor to question the validity of the plaintiff's mortgage. The junior mortgagee, after having purchased in the premises, sold them to the defendant Jacob Beidleman, for the same amount at which they were purchased in by him, and conveyed them by warranty deed to the defendant "subject to the mortgage given by Harry N. Floyd to Cornelius Davis of four thousand dollars," which is the same mortgage then and now owned by the plaintiff, who now insists that the defendant did not purchase the land, but the mere equity of redeeming it from the lien of his mortgage, and hence cannot question its validity. We are therefore now to inquire what the parties meant, the vendor by giving, and the vendee by receiving, the deed subject to the plaintiff's mortgage. And upon this question no doubt is entertained that unless there is something in the surrounding circumstances to warrant a different construction, by a deed subject to a mort-

Morris v. Floyd.

gage the grantor intended to convey, and the grantee to receive, a title subject to the payment, by the grantee, of the mortgage referred to in the grant. And the principle upon which the defence of usury is denied to one who has thus purchased is founded upon the supposition that in the purchase an allowance was made out of the value, or price agreed upon for the premises, with which to redeem the property purchased, from the incumbrance, and that he ought not, under such circumstances, to avail himself of a statute not intended for his benefit. In this case it is true that the grantee of the premises, unlike the mortgagor, had received no advantage from the loan, and had not resting upon him the same obligation which the mortgagor had, to pay or see to the payment of the plaintiff's mortgage. Yet he had the same right which the mortgagor had, (a right which the defendant cannot question,) to waive the defence afforded him by the law, and in the sale of the premises provide for the payment of the mortgage. Let us see whether there is not something in the case beyond what the terms of the purchase indicate, to prove that an abatement was made from the value or price of the premises out of which to pay the mortgage in suit. It is alleged in the bill, and not denied in the answer, that the premises purchased by the defendant were worth at least \$10,000, and it is shown by the answer that there was included in the defendant's purchase 100 acres of land not included in the plaintiff's mortgage, which according to the original estimate placed upon the premises covered by the plaintiff's mortgage, is of the value of about \$2000, not affected by the mortgage in suit. The defendant, then, for the sum of \$575, became seised of lands of the value of \$10,000; and although the defendant purchased of a person of the same name as himself, there is nothing to show that any relationship existed between them, or that there was any other consideration for the grant than that expressed in it. If the premises were worth any considerable amount less than the consideration expressed in the deed, and the mortgage subject to which they were conveyed, that fact, connected with the circumstance that the grantor was not the mortgagor and not benefited by

Morris v. Floyd.

the loan, might afford ground for believing that the payment of the plaintiff's mortgage was not contemplated when the purchase was made. But aside from the 100 acres not included in the plaintiff's mortgage, the property purchased by the defendant was abundantly sufficient, over and above all it cost the defendant, to pay the plaintiff's mortgage, and with the 100 acres there would be a considerable surplus after discharging all claims against it. There is nothing then in the surrounding circumstances of the case, taken together, to show that the defendant's grantor intended to convey him this valuable property for so inadequate a price, or from which to infer that the parties did not intend what the language used by them would ordinarily import. But it is said the answer shows that it was not the intention of the parties that the premises should be conveyed subject to the plaintiff's mortgage. The answer alleged that the deed contained the usual covenants of warranty and was made subject to the mortgage "for the reason that the grantor did not intend or wish to warrant or covenant against the mortgage, as it was then expected and believed as well by the grantor as the grantee, that the complainant would attempt to enforce it, and that a protracted and expensive litigation would grow out of the attempt." The mere fact that the grantor did not wish to covenant against the mortgage, does not tend to negative the idea that he did not intend to convey subject to its payment. The fact that the grantor, as well as the grantee, expected and believed that a protracted litigation would grow out of the plaintiff's attempt to enforce his mortgage, is not consistent with the condition which the terms of the grant imposes upon him. Why expensively litigate a matter which is sure to result adversely? Although this may be regarded as a circumstance of considerable weight to show that it was not the intention of the parties that the title of the defendant should be subject to the plaintiff's mortgage, it cannot avail the defendant here. He knew all the facts when he put in his answer; and if it was the agreement between the parties that the premises should be conveyed to the defendant by deed with covenants of warranty except as against the plaintiff's

Jarvis v. Babcock.

mortgage, instead of conveying them subject to it, the defendant should have so answered, and insisted that in that respect there was a mistake in the deed; that the plaintiff might, if he had chosen, have taken issue upon it, instead of stating a circumstance tending to support the issue he should have tendered.

I am therefore of opinion that the seventh exception was well taken, and the first, fourth and fifth are dependent upon it. The decision at special term, reversing the report of the master upon those exceptions, must be reversed with costs.

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ALBANY GENERAL TERM, January, 1849. *Harris, Watson,
and Parker, Justices.*

JARVIS vs. BABCOCK.

Trusts, in a deed of real estate, by which it is provided that the grantors, while of sufficient capacity, and afterwards their families, shall remain in possession, and continue in the perception and occupation of the rents and profits, are void under the provisions of the revised statutes respecting uses and trusts, if the trustees are not authorized to receive the rents and profits; notwithstanding they are required to take care that the rents and profits shall be properly applied.

To render a trust as to the rents and profits of real estate valid, it is not only necessary that the trustee should be authorized to receive the rents and profits, but that he should be also empowered to apply the same.

A trust, in a deed of real estate, declaring that upon the death of J. the trustees shall hold the premises granted, for the use of the wife and children of J. living at the time of his death, and to the issue of such as shall then be dead, in the manner, upon the terms, and subject to the charges mentioned, declared, and appointed in and by the last will and testament of J., but not authorizing the trustees to take possession or to receive the rents and profits, nor imposing any active duty on the trustees, is a mere formal trust; and no estate, legal or equitable, is vested in the trustees, under such deed.

Nor will any estate pass, under such a trust, to the persons for whose use the property is directed to be held; the deed being void, as to them, for uncertainty.

A trust in a deed, providing that upon the death of J. C. the trustees shall hold

Jarvis v. Babcock.

one half of the premises granted, to and for the use of W., his heirs and assigns forever, and the other half to and for the use of F., H. and C., their heirs and assigns forever, subject to certain charges; and declaring that in case the persons named, or any of them, should be dead before and at the death of the grantor, then such lapsed share or portion should go to the lawful issue, then living, of such deceased person, and if there was no such issue, then such share or portion to go to the right heirs of the grantor, is void for uncertainty.

IN EQUITY. The bill in this cause was filed for the purpose of compelling the specific performance by the defendant of a contract for the purchase of a piece of land belonging to the plaintiff, situate in the town of Bethlehem, Albany county. Another object of the suit was to have a certain instrument purporting to be a deed of trust, made and executed by the plaintiff and his brother Thomas B. Jarvis, to David Burhans and Solomon Bailey, as trustees, decreed to be void, invalid, and of no effect. The bill alleged that on the 30th of November, 1830, Thomas Jarvis, the father of the plaintiff, died intestate, seised of the land in question, leaving him surviving his widow, who was entitled to dower therein, and which was afterwards set off to her. That he also left the plaintiff and Thomas B. Jarvis his only heirs; and that the widow has since died. That on the 21st of December, 1830, the plaintiff was married, and his wife is still living. That on that day the plaintiff and his brother Thomas B. Jarvis made and executed jointly, a trust deed of all their lands, tenements, real estate and chattels real, subject to the widow's right of dower, to Solomon Bailey and David Burhans as trustees, upon the following uses and trusts: "*First*, to permit and allow each of the said parties of the first part during their lives respectively, (provided their capacity or that of either of them shall render it advisable,) to retain the use, possession and enjoyment, and to continue in the perception and occupation of the rents, issues and profits of the estate of such of the parties of the first part as shall so continue capable to manage, govern and control the same for the use of such party and his family and for their maintenance and support, but *Secondly*, if either of said parties of the first part shall at any time or times hereafter become incapable to manage, govern and control his said estate during

Jarvis v. Babcock.

his lifetime, then the said parties of the second part shall permit the family of such party to retain possession of the said estate, and the said trustees (the parties of the second part,) shall take care that the rents, issues and profits thereof shall be properly applied, as well for the education of his children as for the support of himself and family during such incapacity ; and if either of said trustees shall arbitrarily, improperly, or indiscreetly exercise his trust created by these presents or any part thereof, then full power and jurisdiction is reserved to the chancellor of the state of New-York, either to remove such trustee or to regulate and reform his conduct in the premises. *Thirdly.* Upon the death of said Thomas B. Jarvis then the said trustees shall hold the premises belonging to him and hereby granted, with the appurtenances, to and for the use of the wife and for the children of the said Thomas B. Jarvis, lawfully begotten by him and living at the time of his death, and to the issue of such as shall be then dead, in the manner, upon the terms, and subject to the charges mentioned, declared and appointed in and by the last will and testament of the said Thomas B. Jarvis, dated the eleventh day of December instant, and none other or different, and as if the whole of such will was herein inserted. *Fourthly.* Upon the death of the said John C. Jarvis then the said trustees shall hold the premises belonging to him and hereby granted, to and for the uses following, for the use of William Henry Jarvis, (a son of Thomas B. Jarvis,) his heirs and assigns forever, and the other half to and for the use of Ann Farley, Mary How, and Sarah Clark, (daughters of the said Thomas B. Jarvis,) their heirs and assigns forever ; but the whole of the estate of the said John C. Jarvis shall be and is hereby made chargeable with the payment of fifty dollars to Elizabeth Martin, (a step-daughter of the said Thomas B. Jarvis,) and to the further payment of ten dollars to Henry Bailey, son of Solomon Bailey. And in case the said persons herein before named or any of them shall be dead before and at the death of the said John C. Jarvis, then such lapsed share or portion shall go to the lawful issue then living of such deceased person ; and if he or she have no

Jarvis v. Babcock.

such lawful issue, then such share or portion shall go to the right heirs of the said Thomas B. Jarvis, their heirs and assigns forever." The bill alleged that this instrument was executed without any consideration, although it purported to be in consideration of one dollar. That it was made since the revised statutes took effect; that its provisions and trusts were contrary to those statutes; and that the deed and its provisions were void, illegal, and not binding, and did not convey any interest of the grantors to the trustees or other persons named in such deed. That the lands of which the plaintiff's father died seised were divided between the plaintiff and his brother on the 12th of April, 1831, and quit-claim deeds were mutually executed by them, of the portion assigned to each. That at the time of executing the trust deed, the plaintiff resided in the dwelling house of which his father died seised, and was still in the possession and occupation of the lands so set off to him. That Solomon Bailey, one of the trustees, died on the 12th of March, 1839; and that on the 12th of October, 1844, David Burhans, the surviving trustee, executed to the plaintiff and Thomas B. Jarvis a release of the lands in the deed of trust mentioned. That on the 2d of August, 1847, the plaintiff and the defendant entered into a written agreement for the sale and purchase of a piece of the land described in the quit-claim deed from Thomas B. Jarvis and wife to the plaintiff; by which agreement the plaintiff agreed to sell and convey the same to the defendant and the latter to purchase the same, and to pay therefor the sum of \$125 on the 4th day of November, thereafter. That on the 3d day of November, 1847, the plaintiff was ready and willing to deliver a deed to the defendant pursuant to the agreement; but that the defendant on that day served on the plaintiff a written notice, by which he declined to accept the deed, and pay the money. The bill claimed and insisted that the trust deed was illegal and void, and did not divest the plaintiff of any of his right to the land therein mentioned, it being contrary to the revised statutes; that the title to the land remained in the plaintiff, the same as though the trust deed had not been executed; and that the defendant was bound to

Jarvis v. Babcock.

fulfil the contract for the purchase of the land. The defendant, by his answer, admitted that the trust deed was executed since the revised statutes took effect, but denied that the provisions and trusts in such deed were contrary to the provisions of the revised statutes relative to trusts, and insisted that the trusts of such deed were valid, legal and binding, and conveyed some interest or title of the grantors, to the trustees and other persons named therein. The defendant also admitted the execution of the release from Burhans, the surviving trustee, to the plaintiff, but insisted that the same did not cancel the trust deed, or restore the grantors in such deed to their original rights; and that the plaintiff was not able to give a good title to the premises agreed to be conveyed to the defendant; the defendant avowing his willingness, however, to accept a deed from the plaintiff, and pay him the purchase money, if a good title could be shown.

A replication was filed, and the cause was heard on pleadings and proofs.

R. W. Peckham, for the plaintiff.

T. W. Gibb, for the defendant.

By the Court, PARKER, J. The defendant seeks to be protected against a decree for a specific performance of his contract, on the ground that the plaintiff has not a valid title to the premises contracted to be sold to him. Whether this defence is available, depends entirely on the legal effect of the trust deed, executed on the 21st of December, 1830, by the plaintiff and Thomas B. Jarvis, to David Burhans and Solomon Bailey. If that deed was wholly void, so that no title passed under it, or any part of it, then the plaintiff remained the owner of the land, and has it in his power to convey a good title to the defendant.

By the revised statutes, (2 *R. S.* 3d ed. 13, § 45,) uses and trusts, except as authorized and modified in that article, are abolished, and we must therefore look to the other provisions of the article, to see what trusts in regard to real estate are



Jarvis v. Babcock.

permitted. These are found in the 55th section, which is as follows :

"Express trusts may be created for any or either of the following purposes : 1. To sell lands for the benefit of creditors. 2. To sell, mortgage, or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon. 3. To receive the rents and profits of lands and apply them to the use of any person during the life of such person, or for any shorter term, subject to the rules prescribed in the first article of this title. 4. To receive the rents and profits of lands and to accumulate the same, for the purposes and within the limits prescribed in the first article of this title." It is claimed that the first and secondly declared trusts can be sustained under the 3d subdivision of this section. But that subdivision only authorizes a trust to receive rents and apply them to the use of a person. Whereas the trusts attempted to be created provided that the grantors, while of sufficient capacity, and afterwards their families, should remain in possession and continue in the enjoyment of the rents and profits. The trustees are indeed required "to take care that the rents and profits shall be properly applied," but they are nowhere authorized to receive the rents and profits. It is not only necessary that the trustee should receive the rents and profits, but he is also required to make the application. (*Hawley v. James*, 16 *Wend.* 64, *note.*) The doctrine of trusts, as established by the revised statutes, has been very fully examined by our courts, and is now regarded as well established. (*La Grange v. L'Amoureux*, 1 *Barb. Ch. Rep.* 18. *Boynton v. Hoyt*, 1 *Denio*, 53: *Gott v. Cook*, 7 *Paige*, 521. *Coster v. Lorillard*, 14 *Wend.* 265.) I think it is clear that the first two trusts declared by the deed are in contravention of the statute, and therefore void.

By the trust thirdly declared the trustees were, upon the death of Thomas B. Jarvis, to hold the premises granted, for the use of the wife and children of said Thomas, lawfully begotten by him and living at the time of his death, and to the issue of such as shall be then dead, in the manner, upon the terms, and subject to the charges mentioned, declared, and ap-

Jarvis v. Babcock.

pointed in and by the last will and testament of the said Thomas B. Jarvis, dated the eleventh day of December instant, and none other and different, and as if the whole of such will was herein inserted." This will was still inoperative, the testator being yet living; but perhaps it might legally be referred to as a mere memorandum containing certain directions adopted in the trust deed. It has not, however, been shown, on either side, what were its contents or provisions. This third trust does not authorize the trustees to take possession or to receive the rents and profits; nor does it impose any active duty upon the trustees. It is not a power in trust, for they are not authorized to do any act. It is a mere formal trust, and by the last clause of the 47th section, no estate, legal or equitable, vested in the trustees.

It is necessary, next, to consider whether, under this trust, any estate was conveyed to the persons for whose use the property was directed to be held.

By section 47 every person who shall be entitled to the actual possession of lands and the receipt of the rents and profits thereof, in law or in equity, shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest. If the persons for whose use that trust was declared took any estate under the grant it must have been by this section. But without stopping to inquire whether the 47th section is applicable to a future and contingent trust of this description, or whether any estate could pass under the third trust, after the intermediate estate had failed, there are other legal objections which seem to me insurmountable.

If it is the meaning of this trust that the trustees were to hold for the use of the wife during her life, and afterwards for the children of Thomas, &c. then the conveyance is void, on the ground that the absolute power of alienation cannot be suspended by any condition or limitation whatever, beyond the continuance of more than two lives in being at the creation of the estate. (*Sections 14, 15.*) The attempt to suspend the power of alienation beyond the lives of Thomas and his wife;

Jarvis v. Babcock.

would be a clear violation of the statute. But the contents of the will are not shown, and perhaps the language of the trust will bear a different construction from that above given. There is, however, another difficulty in giving validity to this part of the deed as a conveyance. It is indefinite and void for uncertainty. I have shown that no estate passed to the trustee. If any was conveyed by the grantors, it vested in the *cestuis que trust*, under the 47th section. In looking at that question, therefore, they are to be regarded as the parties to the conveyance. The grantees must be plainly described, capable of contracting and competent to take the estate. (8 *John. Rep.* 387. 2 *John. Cas.* 324. *Shep. Touch.* 236. *Co. Litt.* 3 a. *Bunn v. Hinchman*, 9 *John. Rep.* 73. 4 *Kent's Com.* 462. 2 *Black. Com.* 296. *Co. Litt.* 35.) The grant was as much void for uncertainty as if it had been to the church wardens of a parish, or to the inhabitants of Dale, or to the commoners of such a waste. The estate attempted to be conveyed was contingent, as well as uncertain. Who should be parties to the deed, and what interest each should take, depended, among other things, on the number of children or grandchildren who should be living at the time of the death of Thomas. A reservation to persons incompetent to take, even in a deed to a third person, is void. (*Bunn v. Hinchman*, 9 *John.* 74. *Salter v. Kiogly, Carth.* 76. *Whitlock's case*, 8 *Co.* 69.)

This last objection, that the deed was void for uncertainty, is equally applicable to the fourth trust. No certain and defined interest is described in it. The quantity of interest is contingent, depending on the question who, of the persons described, should be living at the death of John C. Jarvis; and till that event happened it could not be ascertained who were the parties to the deed. It seems to me clear that no estate passed either to the trustees or to the *cestuis que trust*.

On the whole I think the trust deed entirely void, and that the title remained in the grantors. It follows that the plaintiff is able to give a good title to the premises contracted to be sold, and is entitled to a decree for a specific performance of the agreement.

SAME TERM. *Before the same Justices.*

ARTCHER vs. McDUFFIE.

It is competent to prove the fact that a judgment which had been recovered against the plaintiff was entered up on a note received from the defendant, without producing the note.

Evidence that a person who had negotiated the sale of land to a third person, for the owner, by agreement with the latter was to have a certain portion of the proceeds of a bond and mortgage given for the purchase money, is proper, in a suit between the parties, and is a good foundation for a subsequent promise by the vendor to pay the amount.

Where a witness, after testifying to a conversation, is asked, on his cross-examination, what reason he had for remembering the conversation, and gives as a reason, a declaration made by one of the parties, at the time, no objection being made to the question by the opposite party, the counsel asking the question cannot repudiate the testimony after the witness has answered the question.

It is not competent for a defendant to prove his own declarations made when the plaintiff was not present, although they were made to a third person in a conversation which took place by the plaintiff's request.

Evidence as to the object for which a release was executed cannot be admitted for the purpose of attempting to change the legal effect of the release: but it is proper to prove that it was executed to a witness, on the trial of a cause, with the view of showing at what time it was given, and that it was not the consideration of the assignment in question, so as to take it out of the statute of frauds.

Under a count for money had and received a party cannot recover from another a sum of money which it was his duty to collect, but which he had failed to collect, by reason of an error in computation made by his attorney.

It is a general rule that the action for money had and received will only lie where money, or its equivalent, has been received by the defendant.

ERROR to the mayor's court of the city of Albany. McDuffie sued Artcher in assumpsit, and declared upon the money counts. The defendant pleaded the general issue, and gave notice of set-off. On the trial the plaintiff offered in evidence a sealed contract between the parties, dated the 8th of January, 1838, in the following words:

"In consideration of an agreement for the sale of the lot hereinafter described, made between me John Artcher of the one part and Angus McDuffie of the other part, and in consideration of a note given me dated this day, for twelve hundred and fifty dollars, with interest, by the said McDuffie

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Artcher v. McDuffie.

payable on the first of March, 1839, for the consideration money agreed upon for said sale, I the said John Artcher do hereby agree and covenant with said McDuffie, that on the payment of the amount due on said note, either on the said first day of March, 1839, or sooner, I will with my wife execute and deliver to said McDuffie a good and sufficient common warranty deed of the one equal undivided half of a certain lot of land situate in the town of Coeymans in the county of Albany, containing about one hundred and one acres, as the same was conveyed to said Artcher by and described in a deed dated May 16, 1837, executed by said McDuffie and wife, and recorded in book of deeds No. 58, page 19, in the office of the clerk of the city and county of Albany. And I further agree that the said McDuffie may have the immediate possession of said farm, and also have all the wood now cut and lying on said premises, and for the cutting of which said McDuffie hereby agrees to pay. And the said McDuffie further agrees, that if he shall sell or agree to sell any of the wood on said lot before the said first of March, 1839, that he will pay to said Artcher the money received on such sales, and deposit with said Artcher all contracts for such sale as security for the payment of the said note until the same is fully paid." The plaintiff then read in evidence a judgment record in favor of the Commercial Bank of Albany, against McDuffie, for \$1403,19, damages and costs, docketed May 6, 1839. He then called as a witness Orlando Meads, who testified that a note of the plaintiff dated about the 8th of January, 1838, for over \$1000, was passed to the witness by Artcher. The plaintiff's counsel then asked the witness, "Did you enter up this judgment on a note which you received from defendant?" This question was objected to by the defendant's counsel unless the note was produced. The objection was overruled, and the defendant excepted. The witness then stated that he entered up judgment on a note passed to him by Artcher; that after he received the note it was discounted at the Commercial Bank; that Artcher paid the amount of the judgment to him. The plaintiff's counsel then read a bond given by Wright & Wells in the penalty of \$3000, conditioned

Artcher v. McDuffie.

to pay to Artcher \$1640,87, one half in June, 1840, and the remainder in December, 1840. The witness testified that this was left with him to collect, and was paid to him in full except a mistake of about \$20 in computation ; that it was received as in full. Witness understood that the bank agreed to assign the judgment to the defendant. The plaintiff's counsel then introduced a deed from Artcher and wife to Ebenezer Wright and S. T. Wells, dated in 1839, for the premises embraced in the contract between the parties, for the consideration of \$1640,87 ; also a mortgage from Wright & Wells to Artcher, to secure the payment of the purchase money. The plaintiff then called as a witness S. Hazeltine, the clerk of one Zeh ; who testified that in May, 1840, the defendant came into Zeh's store and asked if McDuffie owed Zeh. Witness told him he did. Defendant said there was a balance coming to McDuffie through him, on a bond and mortgage of Wells & Wright, and that he would pay Zeh, after taking out a judgment of \$1403,14. The defendant's counsel objected to this evidence, as contradicting the bond and mortgage, they being payable to Artcher. But the court admitted the evidence, and the defendant excepted. The defendant's counsel then asked the witness what reason he had for remembering that conversation. The witness answered that McDuffie said he would send in Artcher. The defendant's counsel objected to testimony of what McDuffie said ; but the court admitted it, as going to show why the witness remembered the conversation. The witness then testified that McDuffie said he would go and get Mr. Artcher to come in and agree to pay over to Zeh the balance that should be coming to McDuffie upon the bond and mortgage ; that Artcher then came in and asked witness if McDuffie was owing Zeh ; that on being informed he was, Artcher said there was a balance coming to McDuffie through him on the bond and mortgage of Wells & Wright, after taking out the judgment he held against McDuffie. The defendant's counsel then moved the court to strike out that part of the testimony of Hazeltine relating to what McDuffie told him in Artcher's absence ; which motion the court denied, and the defendant excepted. The

Artcher v. McDuffie.

plaintiff then called David Zeh, who testified that he was present at a conversation on the subject of who was to have the balance of the bond and mortgage of Wells & Wright after Artcher's judgment was paid. The witness offered to prove the interest of the plaintiff in the bond and mortgage, by Artcher's confessions. This testimony was objected to, as contradicting the bond and mortgage, but was admitted by the court, and the decision excepted to. The witness then testified that Artcher told him he had a bond and mortgage against Wells & Wright, and that he held a judgment for over \$1400, against McDuffie, and whenever that bond and mortgage was paid, he, Artcher, would pay over to Zeh the balance, after paying that judgment; that he would pay the difference between the bond and mortgage and the judgment; that Artcher and the witness had had lawsuits upon the matter. (*See Artcher v. Zeh*, 5 Hill, 200.) That he told McDuffie he would take Artcher as paymaster for the balance due him if Artcher would agree to it; that he afterwards saw Artcher and he did agree to it, saying he would pay the witness all over that judgment; that the plaintiff owed witness some \$335. That afterwards, in September, 1843, witness gave to McDuffie a release of all claims; that no part of the contract between witness and defendant was in writing; that witness released him on the trial of the cause, to make him a witness. The defendant's counsel objected to any testimony as to the object of the release; which objection was overruled, and the defendant excepted. The plaintiff proved by S. S. Wells that he was one of the parties to the bond and mortgage; that it was given to secure the purchase money of a lot of land witness bought of the defendant. The plaintiff's counsel proposed to prove that the plaintiff negotiated the sale, and that the defendant ratified it, by giving the deed. This was objected to as immaterial and inadmissible testimony, but admitted. That witness had no conversation with Artcher on the subject, till the deed was executed; that the bond and mortgage had been delivered to the witness by Edwards & Meads; that he paid to them all they claimed to be due thereon, that he was afterwards notified that there was a mistake of a few dollars, which had

Artcher v. McDuffie.

never been paid in money, and he had never been called upon for it. That in the fall of 1839 he had the first conversation with the plaintiff about the land; that plaintiff told witness he had the selling of one half for Dewell; that he had the selling of the other half, but did not own it; that plaintiff first applied to him to purchase the Dewell half, but on witness' objecting to buy an undivided half, he said the other man would take the same for his half; that 1400 dollars was the amount finally agreed upon; that witness told McDuffie, if witness and Wright could purchase the other half at the same rate they did the Dewell half he would have no objection to take an interest in it; that McDuffie replied he would see the other man and then would be prepared to say; that soon after, the witness saw the plaintiff again; who then stated that the other man would take the same for his half. The plaintiff proved by Mr. Meads that Artcher paid the judgment against the plaintiff; that Artcher was an endorser on the note sued by the bank. The plaintiff rested, and the defendant's counsel moved for a nonsuit, on these grounds: (1.) That there was no proof of a promise by the defendant to pay McDuffie; the only promise being to Zeh; (2.) That if McDuffie had any claim it should be specifically declared on, and could not be recovered under the common counts; (3.) That there was no proof of McDuffie's having any interest in the bond and mortgage; but that the proof showed the contract was forfeited, and all claims under it; (4.) That the promise, if any, was void, for want of consideration, and void by the statute of frauds, because not in writing; (5.) That there was no legal evidence that the note sued on was the same as the note mentioned in the contract; (6.) That the plaintiff having been released from Zeh's debt, the money, *ex æquo et bono*, belonged to Zeh, and not to McDuffie, and that McDuffie could not maintain an action for it. The court denied the motion for a nonsuit. The testimony being closed, the court charged the jury that the first question for them to consider was whether the defendant regarded the contract for the sale of the land to the plaintiff forfeited, or not; that the plaintiff having neglected to comply with the terms of the contract, by the pay-

Artcher v. McDuffie.

ment of the note at the time specified, it became optional with the defendant to forfeit or enforce the contract; that he had a right to do either, but could not do both; that he could not retain the land and still enforce the payment of the note; that if the jury therefore should come to the conclusion, from the evidence, that the defendant regarded the contract as subsisting, and the land was sold to Wells & Wright while the contract was so subsisting, and with an understanding that the plaintiff was to have the balance that it sold for, over and above the amount of the note, and costs, then the plaintiff was entitled to recover the balance of \$100,40, with interest; that as to the alleged mistake of \$20, if it occurred through the fault of the defendant, or of his agent or attorney, it ought not to prejudice the plaintiff. The defendant's counsel excepted to the charge. The jury found a verdict for the plaintiff for \$259,26; and the defendant brought his writ of error.

R. W. Peckham, for the plaintiff in error.

H. G. Wheaton, for the defendant in error.

By the Court, PARKER, J. I will proceed to examine the several alleged grounds of error in the order in which they were presented on the argument. After a judgment record had been introduced, showing that on the 6th of May, 1839, a judgment was recovered in favor of the Commercial Bank of Albany against McDuffie, for \$1403,19 damages and costs, Orlando Meads was called as a witness, and testified that a note against McDuffie, dated about the 8th of January, 1838, for over \$1000, was passed to the witness by Artcher. The witness was then asked by the counsel for McDuffie, "Did you enter up this judgment on a note which you received from defendant?" This was objected to by Artcher's counsel, "unless the note was produced." The objection was overruled and an exception taken. This was not an objection to proving the contents of the note. They had already been sufficiently stated, without objection. I think it was clearly competent to prove the fact

Artcher v. McDuffie.

that the judgment was entered on a note received from the defendant, and that the exception was not well taken.

Several objections were made to the admissibility of evidence, on the ground that it contradicted the bond and mortgage given by Wells and Wright to Artcher. But I think the counsel mistook entirely the effect of the evidence. It did not in any respect contradict the language of the bond and mortgage; nor was it offered for any such purpose. The object of its introduction was to show that McDuffie negotiated the sale to Wells and Wright, and by an agreement with Artcher was to have a certain portion of the proceeds. That Artcher in fact held a part of the proceeds of the bond and mortgage in trust for McDuffie. This was proper evidence, and a good foundation for the subsequent promise. (*Artcher v. Zeh*, 5 *Hill*, 203; *Kane v. Gott*, 24 *Wend.* 641.)

The third point is that Hazeltine, the clerk of Zeh, was permitted to prove the declarations of McDuffie. Hazeltine had been called as a witness and examined by the counsel of McDuffie, and proved a conversation with Artcher in which the latter promised to pay to Zeh the balance of the bond and mortgage against Wells and Wright, after deducting the judgment of \$1403.14. On the cross-examination Artcher's counsel asked the witness what reason he had for remembering that conversation. The witness answered that McDuffie, after giving the note to Zeh, said he would send in Artcher, when the counsel for Artcher made the objection to the witness' stating, in answer, what McDuffie said; but the court admitted the evidence, as being the witness' reason for remembering the conversation called out by the counsel objecting. I see no error in this. The counsel had called for the reason, and no objection was made until it had been given. I do not think he was at liberty afterwards to repudiate it, when he found the reason assigned gave weight to the evidence he sought to invalidate.

The witness, David Zeh, after relating different conversations with Artcher, on inquiry made by the counsel for McDuffie, stated in answer to a question put by the counsel for Artcher,

Artcher v. McDuffie.

that he had conversations with Artcher at other times, at the request of McDuffie, in 1840 ; and the counsel for Artcher then offered to show that Artcher at that time said he did not owe McDuffie any thing. This was objected to, and I think properly excluded. It certainly was not competent for Artcher to prove his own declarations made when McDuffie was not present ; and it did not change the rule that the conversations took place at McDuffie's request.

Zeh testified that on the trial between himself and Artcher he released McDuffie for the purpose of making him a witness, and the counsel excepted to the admission of evidence as to the object of the release. If this evidence was offered for the purpose of attempting to change the legal effect of the release it should have been rejected ; but I think it was competent to show that the release was not made at the time of the contract to transfer the demand against Artcher from McDuffie to Zeh ; for if executed at that time, it might have been a good consideration for the assignment, so as to take it out of the statute of frauds. (*Artcher v. Zeh*, 5 *Hill*, 200.)

I do not think the sixth point well taken. The recorder was right in refusing to nonsuit. The case presented questions of fact, which it belonged to the jury to determine, and there was no question of law involved which would have authorized a nonsuit.

By far the most serious question presented in this case is, whether the recorder erred in charging that McDuffie could recover under the count for money had and received, the \$20 which Artcher had failed to collect on account of an error of computation made by his attorneys. It appeared by the testimony of Mr. Wells that this money had never in fact been paid, though the bond and mortgage had been delivered up to Wells and Wright. The general rule undoubtedly is that the action for money had and received will only lie where money has been received by the defendant. (*Beardsley v. Root*, 11 *John*. 464 ; *Lucket v. Bohannon*, 3 *Bibb*, 378 ; *Maddison v. Wallace*, 7 *J. J. Marsh.* 100 ; *John v. Haggins*, 6 *Id.* 581.) But negotiable notes received by the defendant are often re-

Artcher v. McDuffie.

garded as money. (*Floyd v. Day*, 3 *Mass. Rep.* 405. *Hemmenway v. Bradford*, 14 *Id.* 122. *Willie v. Green*, 2 *N. Hamp. Rep.* 333. *Clark v. Pinney*, 6 *Cowen*, 297. *Mason v. Waite*, 17 *Mass. Rep.* 560. *Ainslie v. Wilson*, 7 *Cowen*, 662. *Arms v. Ashley*, 4 *Pick.* 74.) And when an attorney or agent has discharged a debt due to his principal, and applied that debt to pay his own debt, the amount of the debt so discharged may be recovered in this form of action. (*Beardsley v. Root*, 11 *John.* 464.) Where an agent, having sold land and received a part of the price, and taken notes for the balance, also might, with ordinary diligence have received the whole, and being called on for the money said "he knew nothing about it," he was held liable in this action. (*Hemmenway v. Hemmenway*, 5 *Pick.* 389.)

In this case, Artcher had the entire control of the bond and mortgage. If the facts were found by the jury as they were claimed by McDuffie to exist, it was the duty of Artcher to collect the avails of the bond and mortgage, and pay over to him the proceeds, after deducting the judgment. If Artcher was to be regarded as the agent of McDuffie for this purpose, and discharged a part of the debt without payment, the facts would still fall short of the cases last cited; the sum in question not having gone, in any form, to his benefit. It could not be said he had received money or what was to him an equivalent. But I think the count in the declaration on an *account stated* relieves this case from difficulty. It was proved that Artcher promised to pay the difference between the amount of the bond and mortgage and the judgment; and I think there was evidence sufficient to support that count, so as to include the \$20. (1 *Saund. Pl.* 33; 1 *Chit. Pl.* 343; *Holmes v. De Camp*, 1 *John.* 34; *Montgomery v. Ivers*, 17 *Id.* 38.)

On the whole, therefore, I think none of the numerous exceptions in this case are well taken, and the judgment of the Albany mayor's court must be affirmed with costs.

SAME TERM. Before the same Justices.

PILLOW and wife vs. BUSHNELL and others.

In an action for an assault and battery on the wife, brought by the husband and wife as plaintiffs, the defendant cannot require the wife to testify as a witness, either under the act of 1847 or under section 344 of the code of procedure.

The only disqualification designed to be removed by the statute was that of being a party to the record. It was not intended to change the common law rule which declared the wife incompetent to testify as a witness either for or against her husband.

A person incompetent to testify, from any cause, cannot be made a competent witness under the statute by being made a party to the record.

As a primary rule in the construction of statutes, the intention is to be collected from the words; but when the words are not explicit, it is to be gathered from the occasion and necessity for the law, the defect of the former law, and the designed remedy; being the causes which moved the legislature to enact it.

In an action by husband and wife, brought to recover damages for an injury to the person of the wife, the defendant is at liberty to prove that the act complained of was done by the consent and request of the wife; and if such facts are proved, they will constitute an entire defence.

THIS was an action brought by husband and wife, for an assault and battery on the wife, tried at the Columbia circuit before Justice CADY, in October, 1848. The plaintiffs, some time after their marriage, had joined the society of Shakers, at New Lebanon. The husband abandoned the society, and afterwards, in August, 1847, went back to New Lebanon for the purpose of taking away his wife. She was unwilling to leave, and the assault and battery charged was that the defendants had rescued the wife from the husband when he had her by the arm taking her out of the house. The defence was that in what the defendants did they acted by the consent and at the request of the wife. After the plaintiffs rested, the defendants called Mrs. Ann Pillow, one of the plaintiffs, as a witness to prove the defence. The plaintiff's counsel objected, on the ground that she was called in hostility to the husband's claim, and contended that she was not a competent witness against the plaintiffs. The court overruled the objection, and admitted

Pillow v. Bushnell.

the wife as a witness, and the plaintiff's counsel excepted. The judge, among other things, charged the jury that the wife was necessarily a party on the record; that the declaration alleged the assault and battery to have been committed on her, and she was therefore the meritorious cause of action; and that if the jury were satisfied that no assault had been committed upon her, or that what was done by the defendants was with her consent and concurrence and by her desire, they must find a verdict for the defendants; for if she, being the party assaulted, consented to the assault, if one was proved to have been committed, the action would not lie. The plaintiff's counsel excepted to that part of the charge which held that her consent constituted a defence. And the jury found a verdict for the defendants.

M. Sanford, for the plaintiffs.

C. L. Monell, for the defendants.

By the Court, PARKER, J. The first question to be considered is, whether the wife was a competent witness against the plaintiffs. At common law, husband and wife are excluded from giving evidence for or against each other. They cannot be witnesses *for* each other, because of the identity of interest; nor *against* each other, on a principle of public policy which deems it necessary to guard the security and confidence of private life, even at the risk of an occasional failure of justice. (1 *Phil. Ev. Cowen & Hill's Notes*, 147, note 142. *Greenl. Ev.* §§ 334, 353.) Lord Coke says "a wife cannot be produced against her husband, as it might be the means of implacable discord and dissension between them." (*Coke Litt.* 6, b.) And Starkie gives as the reason for the rule that she is thus excluded for fear of creating distrust and sowing dissensions between them, and occasioning perjury. (2 *Starkie's Ev.* 706.) Under this general rule it has been frequently held that when the husband is a party the wife cannot be a witness either for or against him. (2 *Haw. Cr. L.* 46. 2 *Hale*, 279. 2 *Str.* 1095.

Pillow v. Bushnell.

Fitch v. Hill, 11 *Mass. Rep.* 286. *City Bank v. Bangs*, 3 *Paige*, 36.) So inflexible is this rule, that in a case where the defendant married one of the plaintiff's witnesses after she was actually summoned to testify in the suit, she was held incompetent to give evidence. (*Pedley v. Nellerby*, 3 *Carr. & P.* 558.) The exceptions to the rule are very few, and arise from the necessity of the case; as where the wife is admitted to prove violence to her person, committed by the husband. (*Greenl. on Ev.* § 343.)

So careful is the law to preserve inviolate the confidence between husband and wife, that even after the marriage has been dissolved by divorce *a vinculo matrimonii*, the wife although she may be sworn and is a competent witness as to some matters, is not permitted to disclose conversations or facts that transpired during the coverture. (*Monroe v. Twistleton, Peake's Add. Cas.* 219. *State v. Phelps*, 2 *Tyler's Rep.* 374. *Ratcliffe v. Wales*, 1 *Hill*, 63.) And the same principle was applied where, after the death of the husband, the wife was called as a witness against the administrator. (*Babcock, administrator, v. Booth*, 2 *Hill*, 181.) It is certain that if the suit were brought by the husband alone, his wife could not be a witness either for or against him.

But in this case the wife is a party plaintiff. The suit is brought for an injury to her person, and she was necessarily joined with her husband as plaintiff. And being a party, it is contended on the part of the defendants that she is made a competent witness by statute. By the act of 1847, authorizing parties in civil suits to obtain the testimony of the adverse party, (*Laws of 1847*, p. 630,) it is provided that "any party in any civil suit, &c. may require any adverse party, whether complainant, plaintiff, petitioner or defendant, or any one of said adverse party, to give testimony under oath in such suit or proceeding, in the same manner as persons not parties to such suit or proceeding and who are competent witnesses therein." An enactment substantially the same, though in different language, is found in § 344 of the code of procedure, which is as follows: "A party to an action may be examined as a

Pillow v. Bushnell.

witness at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled in the same manner and subject to the same rules of examination as any other witnesses, to testify either at the trial, or conditionally, or upon commission." This section is made applicable to suits pending at the time the code of procedure took effect, and this suit belongs to that class.

The language of the act of 1847, if literally construed, and without reference to other guides which we are to consult in giving a construction to statutes, might admit of the application claimed by the defendants. "Any adverse party" is an expression broad enough to include every individual made a party, no matter what may be his relation to another party. But statutes must be expounded according to the meaning, and not according to the letter. (1 *Kent's Com.* 462. *Dwarris on Stat.* 552, 557. *Smith's Com. on Stat.* §§ 480, 515, 550. *Gilman's Dig.* 187, § 5.) *Qui haeret in litera, haeret in cortice.* The letter of the law is the body; the sense and reason of the law is the soul. (*Eysler v. Studd, Plowden*, 465. 2 *Inst.* 107.) It is true, it is a primary rule that the intention is to be collected from the words; but when the words are not explicit it is to be gathered from the occasion and necessity of the law, the defect of the former law, and the designed remedy; being the causes which moved the legislature to enact it. (*Dwarris on Stat.* 562.) And the same author says, "it is not to be presumed that the legislature intended to make an innovation upon the common law further than the case absolutely required. The law rather infers that the act did *not* intend to make any alteration, other than what is specified; for if the parliament had had that design it is naturally said they would have expressed it." (*Id.* 564. *Smith's Com. on Stat.* § 530.)

grand jury
not competent
actual law
statute

I think it is clear that the object of this statute was simply to remove the technical objection that previously existed, under which a person could not be compelled to testify, because he was a party to the record; (1 *Phil. Ev.* 72; *Greenl. Ev.* § 353;) and that the only disqualification intended to be removed was that which arose from being a party to the record. It can no

Pillow v. Bushnell.

longer be objected by the witness that he is a party to the suit ; but if there be any other disqualification, it is not removed by the statute. I am unwilling to suppose it was the intention of the legislature to destroy, by implication, and without any enactment clearly expressing such design, the ancient, well settled, and most salutary rule of law which precluded both husband and wife from being witnesses against each other. The reasons which, for centuries, have sustained this rule of evidence against infringement, are no less cogent now than formerly. At no former period has it been more emphatically the dictate of sound public policy to preserve the sacredness of the marriage relation, by protecting its confidence, and guarding against discord and dissension.

The act of 1847 is not expressly repealed by the code ; but if there is any substantial difference in the language of the two acts, the latter would seem to give a legislative construction to the former, if indeed it does not entirely supersede it. I do not, however, think it material to decide this point, having come to the conclusion that the true construction of this new provision, even upon the language used in the act of 1847, does not render the wife a competent witness. An analogous construction was given to the statute of Gloucester, ch. 5. In regard to it, it is said in 2 *Coke's Inst.* 300, "though the assignee of tenant by the curtesy or dower is within the letter of that statute, for he holdeth in some manner for life; and the words are *ou en auter maner a terme de vie* ; yet no action of waste shall be brought by the heir against the assignee, but only against the tenant by curtesy or dower, these being the sole persons against whom it lay at the common law."

If the statute is to be construed as making every party a competent witness, on the call of the adverse party, then it would remove the disqualification of several classes of persons now incompetent—such as convicted felons, insane persons, idiots, children who do not understand the moral obligation of an oath, and others. This could never have been intended. It is not claimed that the wife could have been called against her husband in a suit brought in his name alone. Can it be,

Grant v. Johnson.

that making her a party renders her competent? If so, then a witness is qualified to testify by the fact of being made a party to the suit. A wife not a party is incompetent, but a wife who is a party and who thus has what was formerly an additional disqualification, is a competent witness. Though the same reasons for excluding her as a witness are equally applicable in both cases.

On the whole, I am well satisfied the learned justice erred in receiving the wife as a witness.

As to the other question presented, I am equally well satisfied that the charge was correct. If the act complained of as an assault and battery was committed by the consent and request of the wife, it formed an entire defence. But the ruling at the circuit having been erroneous on the first point, there must be a new trial. Costs to abide the event.

SAME TERM. *Before the same Justices.*

GRANT vs. JOHNSON.

Where a covenant goes only to *part* of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance by the plaintiff.

The plaintiff, in consideration of \$950, to be paid in instalments, agreed to sell to the defendant a piece of land, and covenanted to give possession on the 1st of November, 1845, and to convey by deed on the 1st of May, 1846, "if the above conditions are complied with;" and the defendant covenanted to pay the \$950 in instalments, payable at different times. The plaintiff gave possession of the premises, and the defendant paid the first instalment according to the terms of the agreement, but failed to pay the second; *Held*, that each party having in part performed the agreement, all the remaining covenants were independent, except that relating to the giving of the deed; and that the plaintiff could maintain an action for the second instalment of the purchase money, without averring that he had given, or tendered, a deed to the defendant.

Grant v. Johnson.

THIS was an action of covenant, on an agreement of which the following is a copy: "Articles of agreement, made and agreed upon the twenty-fourth day of August, in the year one thousand eight hundred and forty-five, between Robert Y. Grant, of the town of Neversink, and John Johnson, of the town aforesaid, of the second part, witnesseth, that the said party of the first part for the consideration of the sum of nine hundred and fifty dollars, to be paid as follows, to wit, two hundred to be paid on the first day of April next, two hundred dollars to be paid on the first day of April, 1847, the remainder in two annual payments of equal amount, to be paid on the first of April, of the two succeeding years, together with the interest from the first of April next, agrees to sell to the said party of the second part, a certain piece or parcel of land lying and being in the town of Neversink, and known as part of the Reed farm, beginning at a stone set in the ground in the centre of the road near the bridge, and running thence to the mill race, thence up the board fence to opposite the gates or bulkhead, thence west to the centre of the Neversink river, thence down said river in the manner specified in the deed from the Le Roys to Austin Strong, until opposite the road leading from the place of beginning to the river, thence north up the centre of said road to the place of beginning, supposed to contain about 12 acres, be the same more or less. And the said party of the first part agrees to give the said party of the second part the quiet and peaceable possession of the said premises on the first of November next, with the exception of certain privileges granted to Nicholas Wakely, and described in an article between said Wakely and Austin Strong, and certain other privileges granted to Teunis Misner and described in an article between said Misner and R. Y. Grant. And the said party of the first part further agrees to give the said party of the second part a good and sufficient warrantee deed for the same, on the first of May next, if the above conditions are complied with. And the said party of the first part further agrees to give the said party of the second part the privilege of repairing the said bulkhead which is on his land, and the privilege of entering on

Grant v. Johnson.

his land for the purpose. In witness whereof we set our hands and seals the 24th day of August, 1845.

ROBERT Y. GRANT. [L. S.]

JOHN JOHNSON." [L. S.]

The suit was brought to recover the instalment of \$200, which fell due on the 1st of April, 1847. The plaintiff averred, in his declaration, that he gave the defendant possession of the premises on the 1st of November, 1845, and was ready to convey, according to the true intent and meaning of the article of agreement, on the 1st of May, 1846. The defendant demurred to the declaration, and assigned for cause of demurrer, that it was not averred in the declaration that the plaintiff ever gave, or tendered, a deed.

A. C. Niven, for the plaintiff.

G. W. Lord, for the defendant.

By the Court, PARKER, J. I think the defendant's counsel is mistaken in supposing that this case falls within the rule stated in the second subdivision of Sergeant Williams' note to *Portage v. Cole*, (1 *Saund. Rep.* 320.) I understand that rule only to be applicable, where the act to be done, and the payment of the money afterwards to be made, form each the entire consideration for the other. Such was the case in *Dey v. Dix*, (9 *Wend.* 133,) where this rule was applied, and I do not find that it has ever been extended further. A different rule prevails where the covenant sued on is but a *part* of the consideration; and it is stated in the third subdivision of Sergeant Williams' note above referred to, as follows: "Where a covenant goes only to *part* of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance, in the declaration." This doctrine has been fully recognized by the authorities. (*Tompkins v. Elliot*, 5 *Wend.* 496. *Dey v. Dix*, 9 *Id.* 132. *Bennet v. Pixley*, 7

Grant v. Johnson.

John. 249. Payne v. Bettisworth, 2 Marsh. 429. Obermyer v. Nichols, 6 Binn. 166.) And I think it is controlling in this case.

The agreement in question was made on the 24th of August, 1845. The plaintiff covenanted to give possession on the 1st of November, 1845, and to convey by deed on the 1st of May, 1846, "if the above conditions are complied with." And the defendant covenanted to pay \$950, as follows, viz.: \$200 on the 1st of April, 1846, \$200 on the 1st of April, 1847, \$275 on the first of April, 1848, and \$275 on the 1st of April, 1849. The plaintiff gave the defendant the possession of the premises, and the defendant paid the first instalment of \$200, according to the terms of the agreement. Each party had, therefore, in part performed the agreement; and I think all the remaining covenants were independent, except the giving of the deed to the defendant, which it was expressly provided should depend on the defendant's performing the conditions on his part. In addition to the plaintiff's covenant to convey by deed, on which the plaintiff was liable at the pleasure of the defendant, the defendant had enjoyed the possession of the premises seventeen months when the second instalment fell due; whether the first instalment, which was paid, was more or less than the value of the use and occupation of the premises, is not material, and cannot affect the principle involved. It is enough that each party had received the benefit of a part performance, and that what remained to be performed on one part did not form the sole and entire consideration for what remained to be performed on the other part. It is evident, therefore, that exact justice cannot be administered, under such circumstances, except by holding the remaining covenants to be independent, and making each party responsible in damages, to the extent to which he shall fail to perform.

In *Tilston v. Newell*, (13 Mass. 406,) it was held that if there be any consideration for the covenant of one party, besides the covenants of the other, and that consideration has been received by the former, his covenant will be considered as independent. Where payments are to be made at different times,

Grant v. Johnson.

the covenants to pay are held to be independent. Where A., by articles of agreement dated September 9th, 1807, covenanted to execute a deed in fee to B., on the 15th of May, 1808, and B., in consideration thereof, covenanted to pay A. \$50, in four weeks after the date of the agreement, \$50 in three weeks thereafter, \$900 on the 15th of May, 1808, &c. the covenants were held to be mutual and independent. (*Wilcox v. Ten Eyck*, 5 *John. Rep.* 78. *Robb v. Montgomery*, 20 *Id.* 15.)

It will not be controverted that an action will lie to recover an instalment payable *before* the deed is to be delivered; such covenant to pay being independent. This has been frequently held. (2 *Pick.* 300. 5 *Cowen*, 509. 4 *Wend.* 377. 10 *John.* 203. 2 *Id.* 145. *Minor*, 21. 2 *Bibb*, 15.) In this case the plaintiff could have sued for the first instalment of \$200 when it fell due, on the 1st of April, 1846. He would not have been required to wait one month longer, till the time fixed for him to execute the deed. And the covenant to pay, being independent, it followed that the covenant subsequently to convey was also independent. In *Gardner v. Corson*, (15 *Mass.* 503,) Jackson, J. says: "If he (the defendant) had covenanted to pay any substantial part of the consideration money before the delivery of the deed, that would show that he relied on the covenants of the plaintiff; and that he did not intend to make the performance by the plaintiff the condition of performance on his part."

The case of *Weaver v. Childress*, (3 *Stew.* 361,) goes still further than the plaintiff claims, in this case. There A., under covenant, sold land to B., for a sum certain, and B. agreed to pay one half thereof on the first day of January thereafter, on or before which day A. covenanted to give him possession, and the other half thereof on the subsequent January, at which time A. covenanted further to make B. valid titles; and it was held that these were mutual and independent covenants. And in a suit brought by A. after the time when he was to make title had elapsed, to recover the purchase money of B., who was presumed to be in possession, an averment in the declaration

The People v. Schuyler.

of A.'s ability and readiness to convey, was held to be surplusage.

Even where the covenants are dependent, when the plaintiff has performed a part for which he can have no other remedy than by action on the covenant, an action may be maintained in the same manner as if the covenants were independent. (*Lewis v. Weldon*, 3 *Rand.* 71.)

There must be judgment for the plaintiff on the demurrer, with leave to the defendant to amend on payment of costs.

SAME TERM. *Wright, Watson, and Parker*, Justices.

THE PEOPLE, *ex rel.* Kellogg, *vs.* SCHUYLER and others.

The sureties of a sheriff are liable on his official bond only for acts done *virtute officii*, and not for those committed *colore officii*. They are not accountable for a trespass committed by the sheriff in taking property not directed to be taken by process.

As to such an act, the sheriff has no protection from his process; and it does not change the character of the wrong that he committed it *colore officii*. He stands in the same position as if he had acted without process.

The sureties in a sheriff's bond are not liable for a trespass committed by the sheriff in seizing the goods of a third person, upon an attachment issued against the property of an absconding debtor, and for refusing to deliver such goods to the claimant after a jury have found the property to be in him, and the attaching creditor has executed a bond of indemnity to the sheriff.

The duty of sheriffs is the same on attachments that it is on executions. In both cases the sheriff is bound to keep possession of the property, if indemnified, although the jury may have found the title to be in a third person.

THIS was a suit brought to recover upon the official bond of Cornelius Schuyler, former sheriff of Rensselaer county. The bond was in the penalty of ten thousand dollars, dated January 13, 1840, with the following condition: "Whereas the above bounden Cornelius Schuyler hath been elected to the office of sheriff of the county of Rensselaer, at the general election

The People v. Schuyler.

held therein, on the sixth, seventh, and eighth days of November, 1837. Now therefore the condition of the above obligation is such that if the said Cornelius Schuyler shall well and faithfully in all things perform and execute the office of sheriff of the said county of Rensselaer, during his continuance in the said office, by virtue of the said election, without fraud, deceit and oppression, then the above obligation to be void, or else to remain in full force." The bond was executed by Schuyler, and by Heartt and four others as sureties. The plaintiff assigned for breach that on the 11th of June, 1840, an attachment, issued on the petition of Thomas McVity, against the property of one Dexter M. Fay, as an absconding or concealed debtor, was delivered to the said Schuyler as such sheriff to be executed, and that by virtue thereof, the said Schuyler as such sheriff claimed to seize, and did seize the property of William A. Batchellor. That the property being claimed by the said Batchellor, the said sheriff summoned a jury to try the said claim, who found the property to be in the said Batchellor; whereupon, to prevent the sheriff delivering the property to said Batchellor, the said attaching creditor executed a bond with sureties to said sheriff, by which he indemnified him for the detention of the property, and that said sheriff accordingly detained the property. That thereupon the said Batchellor brought an action of trespass against the sheriff for taking away said property, and on the 2d of Sept. 1842, he recovered a judgment for \$2290,05, damages and costs. The declaration contained also averments of the death of Batchellor; of the granting of letters of administration to Kellogg; of permission granted, on scire facias, to issue an execution; of the issuing of a fieri facias, and a return of nulla bona; of the insolvency of Schuyler; and of leave granted by the court to prosecute his official bond. The defendant demurred, on the ground that no sufficient breach of the bond was shown in the declaration.

Job Pierson, for the plaintiff.

Samuel Stevens, for the defendant.

The People v. Schuyler.

By the Court, PARKER, J. The statute declares in what cases the official bond of a sheriff may be prosecuted. (2 R. S. 2d. ed. 390, § 1.) These are only where he has become liable for an escape, or where he has been guilty of some default or misconduct in his office. The condition of the official bond is, that he shall well and faithfully perform and execute the office of sheriff, without fraud, deceit or oppression, &c. I think it must now be considered as settled, in this state, that the sureties of a sheriff are liable on his official bond only for acts done *virtute officii*, and not for those committed *colore officii*. They are not accountable for a trespass committed by him in taking property not directed to be taken by process. As to such an act the sheriff has no protection from his process; and it does not change the character of the wrong that he committed it *colore officii*. He stands in the same position as if he had acted without process.

The law on this subject was very fully examined by Mr. Justice Cowen, in *Ex parte Reed*, (4 Hill, 572.) In that case there had been a recovery in trespass, against the sheriff, by a person not a defendant in the execution, for goods seized by the deputy under a *fi. fa.*: and the judgment not having been satisfied, an application was made for leave to prosecute the official bond of the sheriff, which was refused. The court held that the condition of the bond did not extend to a trespass committed by the sheriff, or his deputy, in seizing the goods of a third person; that such an act was not in the performance and execution of his office. The case of *Carmack v. The Commonwealth*, (5 Binn. 184,) cited on the argument before us, by the plaintiff's counsel, is there commented on and questioned.

But it is claimed by the plaintiff's counsel, that there is a distinction to be taken between the case we are considering and *Ex parte Reed*, because on an attachment the sheriff is required by statute, (1 R. S. 2d ed. 767, § 11,) to retain the property, if indemnified, notwithstanding it may have been found by the jury to be the property of the claimant. No such difference, however, exists. The law is the same in regard to property seized on a *fieri facias*. (*Curtis v. Patterson*, 8 Cowen, 67.)

Beecher v. Allen.

And I think the provision of the revised statutes last above referred to, which is not found in the act of 1813, was inserted for the purpose of making the duty of sheriffs the same on attachments that it is on executions. (*Batchellor v. Schuyler*, 3 *Hill*, 386.) In both cases the sheriff is now bound to keep possession of the property, if indemnified, although the jury may have found the title to be in a third person. The statute has made the practice under an attachment to conform in this respect to what had long been the common law rule in regard to property levied on under an execution.

The demurrer is well taken, and the defendant must have judgment.

SCHENECTADY GENERAL TERM, January 1849. *Cady*,
Paige, and Willard, Justices.

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BEECHER vs. ALLEN and others, adm'rs of Day.

The 30th section of the judiciary act of May 12, 1847, prescribing in what special cases the respective county courts shall have original civil jurisdiction, is not unconstitutional.

Under the 14th section of the 6th article of the constitution, the legislature had the power to determine of what special cases the county courts should have jurisdiction. And it having exercised that power, by giving to those courts jurisdiction over actions of assumpsit, when all the defendants reside in the county where the action is commenced, and the damages claimed do not exceed \$2000, county courts have authority to try actions of that nature.

Courts ought not rashly to presume that the legislature, in enacting a law, has transcended its powers. The presumption is the other way; and the strength of that presumption is increased in proportion to the number of successive legislatures which have coincided in the same measure. *Per WILLARD, J.*

THIS was an appeal by the defendants, from the Saratoga county court. The action was assumpsit, and was commenced in that court after the first Monday of July, 1847, and was tried in the term of January, 1848. The parties were inhabit-

Beecher v. Allen.

ants of the county of Saratoga, and the sum claimed in the plaintiff's declaration did not exceed \$2000. The jury found a verdict for the plaintiff for \$208,78. The facts and the legal questions arising thereon, appear from the following opinions delivered by members of the court.

W. A. Beach, for the plaintiff.

E. F. Bullard, for the defendants.

WILLARD, J. The plaintiffs, as administrators of Eliphas M. Day, deceased, in the year 1847, and after the first Monday of July of that year, brought a suit against the defendant, upon a guaranty in writing, endorsed on a promissory note made by Lucius Loss and George Kemp, in these words: "For value received I guaranty the collection of the within note, and waive all notice. July 19, 1842. Ira Beecher." It was admitted that E. M. Day died in December, 1842. It does not appear by the case to whom the note was made payable, nor the amount for which it was given, nor the time when. There was due on the day of trial, in the county court, according to the verdict of the jury, \$208,78. We may infer that the note was payable to Ira Beecher or order, or that it was given to Day in his lifetime, at the same time the guaranty was executed; in either of which cases the charge of the judge contained no error of which the defendants could complain. (*See Lequeer v. Prosser*, 1 *Hill*, 256. *Miller v. Gaston*, 2 *Id.* 188. 3 *Id.* 584.) The plaintiffs were entitled to recover.

But there is another question of greater importance in this case, and which deserves a careful examination. The action was assumpsit, commenced in the Saratoga county court after the first Monday of July, 1847, and was tried at the January term, 1848. The parties were inhabitants of Saratoga county, as we may infer from the evidence, and the sum claimed did not exceed two thousand dollars. This appeal, therefore, involves an inquiry as to the constitutionality of the 30th section of the judiciary act of May 12, 1847, and incidentally of a part

Bescher v. Allen.

of the 33d section of the code of procedure. The courts ought not rashly to presume that the legislature, in the enacting of any law, has transcended its powers. The presumption is the other way; and the strength of it is increased, in proportion to the number of successive legislatures which have coincided in the same measure.

The question is whether original civil jurisdiction can be conferred by the legislature on the county court, in any action known to the common law. The provision in the constitution, under which the question arises, is the fourteenth section of the sixth article; and is in these words: "The county court shall have such jurisdiction in cases arising in justices' courts, and in *special cases*, as the legislature may prescribe; but shall have no original civil jurisdiction, except in such special cases." A subsequent clause in the same section, authorizes the legislature "to confer equity jurisdiction in special cases, upon the county judge." The 30th section of the judiciary act of May 12, 1847, carries out the constitutional requirement above referred to, and prescribes in what special cases the respective county courts shall have original civil jurisdiction. It is in these words: "The county courts in each county shall have power to hear, try and determine, according to law, suits and proceedings by scire facias to revive any judgment in said courts, or that shall have been rendered in the present court of common pleas of said county, or to have execution of said judgments, or to revive any suit in said county courts; also of suits and proceedings for the admeasurement of dower, or for the partition of lands, when the lands are situated in the county where the court is held; also to hear, try and determine, according to law, the following actions, when all of the defendants at the time of the commencement of the action, reside in the county in which said court is held; actions of debt, assumpsit and covenant, when the debt or damages claimed shall not exceed two thousand dollars; actions for assault and battery, and false imprisonment, when the damages claimed do not exceed five hundred dollars; actions of trespass, and trespass on the case, for injuries to real or personal property, when the damages

Beecher v. Allen.

claimed shall not exceed five hundred dollars; actions of replevin, when the value of the property claimed does not exceed one thousand dollars; and also to grant new trials in all such actions, suits, and proceedings."

In determining the question before us, it becomes necessary to inquire what is meant by the term *special cases* in the fourteenth section of the sixth article of the constitution, and what department of the government is clothed by that instrument, with power to determine, in the first instance, the meaning of that term.

I. The question what is meant by the term, *special cases*, was discussed in the senate, when the judiciary act was before that body, and more fully before the judiciary committee which reported the bill. It was contended by the learned chairman of that committee, now holding a seat on this bench, that, by the term *special cases* the framers of the constitution intended to confine the original civil jurisdiction of county courts to those particular cases to which the ordinary common law actions are not applicable. It is not improbable, from the discussions in the convention, that some of its members supposed this clause restricted the jurisdiction of the courts to certain statutory proceedings and cases, such as granting licenses for ferries, and the like. But the views of particular members of the convention are of subordinate importance. Those gentlemen were no better qualified to judge of the meaning of the constitution than their constituents. The instrument derives its force from the sanction given to it by the people at the polls. It is to be understood according to the language in which it is clothed. Judge Story has well collected the rules for interpreting a constitution or statute, in his Commentaries on the Constitution. (*Vol. 1, p. 382 et seq.*) Without repeating his several rules, with their qualifications and limitations, it is sufficient in general to observe, that the terms of the instrument are to be construed according to the sense and intention of the parties by whom it was adopted. This intention is to be gathered from the words, the context, the subject matter, the effects and consequences, or the reason and spirit of the instrument. When

Beecher v. Allen.

the same words are used in other parts of the same instrument, and in statutes and in books of authority, a regard may be had to the ideas they are thus used to express, in order the more clearly to elucidate their meaning in the passage under dispute. Cotemporaneous expositions by the legislature, and especially by successive legislatures, are not without use in giving a practical construction even to a doubtful or equivocal term.

In looking at the question in dispute in the light of these rules, we shall find that the term *case*, in other parts of the constitution, and in divers parts of the revised statutes, is indisputably used as synonymous with *cause* or *action*. Thus in the 10th section of the 6th article it is said, "The testimony in equity *cases* shall be taken in like manner as in *cases* at law." If the term *cases*, in this passage, it to be construed as meaning merely a special proceeding, and not as embracing *actions*, the improvement with respect to taking the proofs on the equity side of the court, is a mere illusion. But, if we understand the term as synonymous with *actions*, it reconciles every difficulty, and harmonizes with other parts of the instrument.

So also by the 5th paragraph of section 14, now under discussion, it is declared that "the legislature may confer equity jurisdiction in *special cases* upon the county judge." Under this clause, the 31st section of the judiciary act of April 12, 1847, conferred equity jurisdiction on the county courts, in the following cases: "1st. In suits and proceedings for the foreclosure of mortgages, when the mortgaged premises are situated in such county. 2d. For the sale of real estate of infants, when the real estate is situated and the infants reside in such county. 3d. For the care and custody of lunatics and habitual drunkards, residing in such county. 4th. For the satisfaction of judgments and decrees on which there shall remain due a sum exceeding seventy-five dollars, out of the property of a debtor, when an execution has been returned unsatisfied, and said debtor resides in such county. 5th. For the partition of lands in such county. 6th. For the admeasurement of dower in lands in such county." If the term *special cases*, in this paragraph of the constitution, is to be restricted to the narrow

Beecher v. Allen.

limits within which it is sought by some to confine the same words, in the first paragraph of the same section, much of the foregoing delegation of power could not be upheld. Yet the legislature of 1847 did not doubt the constitutionality of the foregoing section, nor has it been questioned since. The commissioners on pleadings and practice, in their report to the legislature of 1848, retained it with only a few verbal alterations, and it now forms the 33d section of the code of procedure. It thus embraces under the head of *special cases*, the action of partition of real property, with no other limitation than its location in the county. The action of partition was the ancient common law remedy for making partition among parceners. (*Lit. book 3, part 1, ch. 1, § 241. Co. Lit. 163, a, 164, b, and Hargrave's note 23.*) The action was extended in the reign of Henry the eighth to joint tenants and tenants in common, and has remained ever since, a common law action both in England and in this state. According to Mr. Hargrave, the jurisdiction of chancery, in making partition of lands, is of later origin, and cannot be traced farther back than the reign of Elizabeth, though it is conceded that both the common law courts and the court of chancery now have undisputed concurrent jurisdiction of the action. (*Harg. notes 2, 3, to Lit. supra.*) It is undoubtedly a civil action, within the proper definition of that term. The conferring original jurisdiction of that action upon the county courts, by the legislature of 1848, under the name of a *special case*, affords a legislative exposition of the term, which justifies every delegation of jurisdiction made by the 30th section of the judiciary act of 1847. No man can respect himself, who holds that it is constitutional to give the county judge jurisdiction in the action of *partition*, and is not constitutional to confer the like jurisdiction in *assumpsit*.

There are other parts of the constitution in which the same term is used, and in the same sense which the legislature have adopted. Thus the 23d section of the 6th article authorizes the establishment by the legislature of tribunals of conciliation, with such powers and duties as may be prescribed by law, and with authority to render obligatory judgments on the par-

Beecher v. Allen.

ties, in matters in difference voluntarily submitted to them by the parties, "in such *cases* as shall be prescribed by law." In this passage the word *cases* is obviously used as synonymous with causes or actions.

The term "*special*," whether applied to "cases" or other judicial subjects, has long had a well known signification in our laws. It is used in opposition to *general*, and thus means a designating of a species or sort—a separation of a part from the whole. The 8th chapter of the revised statutes, part 3d, entitled "of proceedings in *special cases*," affords a legislative exposition of the term, adopted nearly twenty years ago, and acquiesced in ever since. That chapter embraces the entire action of replevin; an action supposed to be known to the common law for at least five hundred years, and in use two centuries before the action of assumpsit, which is the creature of the statute. In the 3d article, title 2d, chap. 1, of part 2d "of powers," the legislature divides them into *general* and *special*; and defines a general power to be when it authorizes the alienation in fee, by means of a conveyance, will, or charge of the lands embraced in the power to any alienee whatever; and a *special* power to be, 1st. When the person or class of persons to whom the disposition of the lands under the power is to be made, are designated; and 2d. When the power authorizes the alienation, by means of a conveyance, will, or charge of a particular estate *less than a fee*. Thus the term *special* is applied when the persons or estate, less than the whole, which are the objects of the power, are *designated*. It is correctly so applied. The term *special* is obviously used in the same sense in title 1, chap. 4, of part 2d, "Of limited partnerships;" in the 2d section of which is described the difference between *general* and *special* partners. It is used in a similar sense in the act relative to bills of exchange and promissory notes, in title 2d of the same chapter; and the difference between a *general* and *special* endorsement and acceptance, in the law merchant, has long been known. We have the same distinction of the terms as applied to courts and terms of courts. Thus we have the general sessions and the special sessions; the latter having only a

Beecher v. Allen.

portion of the power allotted to the former. We have also the *general* and *special* terms of the supreme court, the one being unlimited in its jurisdiction and the other restricted to particular sorts of business. Instances of this kind may be multiplied beyond number, but the foregoing are sufficient for the present purpose.

From what has been said we may deduce the conclusion that *special cases* in equity embrace such subjects of litigation, or of judicial cognizance, falling within the range of equity jurisdiction, less than the whole, as the legislature may prescribe. And we may also infer that the *special cases* of which the legislature is authorized to give the county courts original jurisdiction, by the first clause of the 14th section of article 6, embrace causes of action which were formerly redressed by actions at common law, but limited either with respect to the amount to be recovered or the residence of the parties. The term *special* is put in opposition to *general cases*. The latter embraces all causes of action of whatever amount, wheresoever and by whomsoever committed, and by whatever name described. This jurisdiction is by the 3d section of article 6th conferred upon the supreme court, which, under the constitution, is the only tribunal having general jurisdiction in law and equity. Any court on which a jurisdiction may be conferred over any portion of the *general cases* less than the whole, either with respect to the name of the remedy, the residence of the parties, the amount to be recovered, or the location of the matter in dispute, may appropriately be said to have jurisdiction in *special cases*. It is precisely this jurisdiction which the legislature, by the judiciary act of 1847, conferred upon the county court; and we think that this exercise of their authority was warranted by the constitution.

The objections which are raised to the foregoing construction of the constitution are derived from the supposed opinion of the prevailing majority in the convention which formed that instrument. (*See note in the first report of the commissioners on practice and pleadings, p. 43, et seq.*) This opinion is presumed to be adverse to the existence of the power, because the

Beecher v. Allen.

convention refused to continue the common pleas courts, as they formerly existed, and adopted a system of thirty-two supreme court judges. (*Id.* 40.) Nothing can be more unsafe, as a rule of constitutional construction, than to repose on the private opinions of the individuals composing the convention. Some may have voted against an amendment of the section in question, proposing to give original jurisdiction to the county courts, upon the ground that it was already expressed with sufficient clearness. Some may have interpreted the clause strictly and closely; others, from a different habit of thinking, may have given it a large and liberal meaning. It is not to be presumed that even in the convention the various clauses of the constitution were understood in the same sense by every member. Each member judged for himself; and the judgment of no one could or ought to be conclusive upon that of others. Even if it could be proved that every member in the convention entertained the opinion that under the term special cases, no action at common law was embraced, it would not alter the case. The constitution is not a charter granted by the delegates to the people. It is rather a system of government adopted by the people themselves; and is to be interpreted, not according to the views of particular delegates, but in the sense in which it was understood by the people. It has grown to be a proverb that the framer of a law is not always the best judge of its meaning. He may indeed remember his own peculiar intention; but this will often blind him to the true interpretation of the law. (*See 3 Campbell's Lives of the Chancellors*, 331, *note*.) Some stress is laid by the commissioners on practice and pleadings, in their note, *supra*, upon the 5th section of the 14th article, as indicating the opinion of the convention, that the 14th section of article 6 did not authorize the legislature to confer original jurisdiction on the county courts. On this it may be remarked that the 14th article was temporary in its character, its object being merely to put the government in motion. It was of no consequence whether the suits pending in the common pleas which was abolished, were transferred to the county court, or the supreme court. The article called forth no dis-

Beecher v. Allen.

cussion, and the "*superfluous and*," of which we have a history, (*id.* p. 42,) was not known by the voters to be an intruder. There is no doubt that the writer of the note before cited intended to exclude original jurisdiction in actions at law from the county courts; but his opinion, however much to be respected, cannot overthrow the effect of the words used, nor neutralize the influence of the practical interpretation by two successive legislatures.

II. We proceed now to inquire what department of the government is clothed with the requisite power to decide, in the first instance, what is meant by special cases. This is devolved upon the legislature, by the constitution itself. The third article of the constitution vests the legislative power of this state in a senate and assembly. There is no restriction or limitation of this power affecting the present question. By the 5th section of article 6, it is in express terms declared, that "the legislature shall have the same powers to alter and regulate the jurisdiction and proceedings, in law and equity, as they have heretofore possessed." The 14th section of the 6th article restricts the legislature from granting original civil jurisdiction to the county courts, except in such special cases as they shall prescribe; and thus by necessary implication, authorizes the legislature to confer upon those courts original civil jurisdiction in such special cases. The legislature is the body upon which is devolved the duty of putting the government in motion under the new constitution. Without its aid, the various departments of government would have remained forever in a state of suspended animation. No election could have taken place, nor could the means of supporting the government have been otherwise obtained. The courts could not have acted, until they were duly organized, and the appropriate subjects of jurisdiction assigned to them. It therefore necessarily devolves upon that body to decide first, what are special cases, and secondly, to prescribe which of these shall be assigned to the county courts. From the nature of things, confidence must be reposed somewhere. In the present instance it is intrusted to the people's own immediate representatives; and why should the exercise

Beecher v. Allen.

of it be viewed with jealousy? A constitution which should contain an accurate detail of all the minute subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, and of the various subjects of jurisdiction of which its courts respectively may take cognizance, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. (*See 4 Wheaton, 407.*)

The power to prescribe the "*special cases*," is, in the present instance, absolute and unrestricted. It is not only the right, but the duty of the legislature to act in the premises. It must make the selection of *some* out of many *special cases*, to fulfil the mandate of the constitution. It must, therefore, according to the dictates of reason, be allowed to judge for itself and make its own selection. It is responsible to its constituents for the wisdom of its choice, but there is no other appeal. The fitness of the selection can never be determined in a judicial forum. It is as much within the control of legislation as the details of the election law, the law giving compensation to public officers, or any other administrative law. The legislature thus having the power of prescribing what are special cases and what are not, the more or less special, or whether or not of the character which particular members of the convention intended, can never enter as an ingredient into a judicial decision.

The learned commissioners on practice and pleadings, in their note, pages 41, 42 in their first report, insist that it was not the intention of the constitution to confer jurisdiction on the county courts for the trial of ordinary actions between party and party. They maintain that it was a cherished object of the constitution to have a common tribunal for the trial of all civil actions, except those cognizable by a justice of the peace. After quoting the language of the constitution, "The county courts shall have such jurisdiction *in cases arising in justices*'

Beecher v. Allen.

courts, and in special cases, as the legislature shall prescribe, *but shall have no original civil jurisdiction, except in such special cases*," they remark, that if all the qualifying words of this provision restricting its jurisdiction were stricken out, it would read thus: "The county court shall have such jurisdiction as the legislature may prescribe." "These words," they say, "would place the whole subject of the jurisdiction at the disposal of the legislature, where the friends of a common pleas system in the convention desired it to be, and sought in vain to place it." They insist that the judiciary act of 1847 construes it in that way; and they maintain that if under *special cases*, jurisdiction of an ordinary action at law can be conferred upon the county court, "the qualifying words in the section have no meaning, and the provision would have precisely the same effect without as with them."

So far as the constitution is to be construed by its words, our views have already been expressed, and need not be repeated. But we think also the commissioners err, when they say, that the construction given to the section in question by the legislature of 1847, renders the qualifying words of no meaning. Without these qualifying words, it is conceded that the whole subject of jurisdiction would be at the disposal of the legislature without limitation or restriction. That body might then confer jurisdiction in *general cases* upon every subject of judicial cognizance. With these words, the power of the legislature is limited to such *special cases* as they may prescribe. The difference in construction between the section in the constitution with the qualifying words and without them, is precisely the difference between *special* and *general cases*. It is the difference between the exercise of a power, restricted to such limits as they in their wisdom may judge fit, and the exercise of a power without limitation or restraint. The convention, therefore, did no vain and idle act, when they inserted the qualifying words in question, and neither the legislature of 1847 nor that of 1848 transcended their power when they conferred upon the county court original civil jurisdiction in common law actions,

Beecher v. Allen.

with the restrictions contained in the judiciary act in the one case, and in the code of procedure in the other.

The learned commissioners, in our judgment, repose too much on the presumed private intentions of the "prevailing majority" in the convention; as if the constitution was a mere grant from the convention, and the people its beneficiaries. We have already endeavored to show the fallacy of this reasoning.

It has been already remarked, that the legislature is clothed by the constitution with power to determine, in the first instance, the meaning of the term *special cases*. The same principle applies to every department of the government upon which any duty is devolved. It must decide, in the first instance, upon the circumstances under which its power is invoked, and whether, consistently with the constitution the act can be done. If, for instance, the executive is applied to for a pardon, he is not only authorized but required to decide for himself whether he has a constitutional power to grant it or not. If he grants it, in a case in which the power is not delegated to him, or against the regulations which the legislature, under the constitution may prescribe, the act may be a nullity. But there are many cases in which the decision of the executive, thus made, becomes final and conclusive, being from their very nature and character incapable of revision. Thus, should the executive grant a pardon, in a case within his constitutional power, but for reasons manifestly insufficient, the act would be legal, because there is no power to review it. So also in measures of a political or administrative character, where the supreme authority belongs to the legislative and executive departments, those measures cannot be re-examined elsewhere. Thus, the legislature, having the power of taxation, the question as to whether the tax should be one cent on the dollar, or two cents, can never become the subject of re-examination in any other tribunal. And yet, cases may readily be imagined, in which a tax may be laid, upon motives and grounds wholly beside the intention of the constitution. (*See 1 Story on Con.* 545, 546, § 374.) The case under consideration belongs to the same class of powers where a discretion is confided to the legislative

Beecher v. Allen.

department, with respect to the selection of subjects of jurisdiction, less than the whole, in which the decision of the legislature, thus made, is conclusive.

But when the question is of a different nature, and capable of judicial inquiry and decision, it admits of a different consideration. The decision there made, by the legislature or executive, whether in favor or against the constitutionality of the act, being capable, in its own nature, of being brought to the test of the constitution, is subject to judicial revision. It is in such cases, as we conceive, that the judiciary is made the final arbiter, provided by the constitution itself, to whose decisions all others are subordinate. An exemplification of this principle will be seen, should the legislature attempt to take the private property of a citizen, for public purposes, without compensation, contrary to section six of the first article of the constitution. In such case the citizen whose rights were invaded could invoke the aid of the judicial power to *prevent* the mischief, or to obtain redress after the mischief had been accomplished.

In conclusion, we entertain no doubt that the 30th section of the judiciary act of 1847, was a just exposition of the jurisdiction intended by the constitution to be conferred upon county courts, and that the legislature is the sole and exclusive judge of the subjects of jurisdiction thus to be assigned, provided such assignment is not of general and unlimited authority, but is special in its character.

The judgment, therefore, of the county court must be affirmed.

CADY, P. J. [after disposing of the other parts of the case, proceeded to discuss the constitutional question as follows:]

Another ground was urged on the argument, for reversing the judgment; to wit, that the county court had no jurisdiction of the cause, for the reason that the act of the legislature, professing to confer jurisdiction, was unconstitutional and void. An objection to a statute ought to be very obvious, to justify this court in pronouncing it void. By the 14th section of the 5th article of the constitution, it is declared that "the county courts shall have such jurisdiction in cases arising in justices' courts,

Beecher v. Allen.

and in special cases, as the legislature may prescribe ; but shall have no original civil jurisdiction, except in such special cases." It is very possible that the members of the convention supposed this clause as clear as a ray of light, and that no person of common understanding could fail to know what was intended by it. But we find not only men of common understanding, but able and experienced jurists, disagreeing as to its meaning. Then, what ought to be the interpretation? That which will most restrain, or that which will give the largest liberty to legislative power? There ought to be no limitation to the power of the legislature of an independent state, except what may be found in the fundamental law, and the great and eternal principles of justice, morality and religion.

What are special cases? To whom did the constitution delegate the power to determine what suits and proceedings might be known as special cases? The legislature was to determine of what special cases a county court should have jurisdiction, and on the 12th of May, 1847, they undertook to designate them, and amongst other special cases, they gave the county courts jurisdiction over actions of assumpsit when all the defendants reside in the county in which the action is commenced, and the damages claimed do not exceed two thousand dollars. That, as the legislature of 1847 understood the constitution, was a special case. It was distinguished from all others, that the defendants must all reside in the same county, and not more than two thousand dollars must be claimed. Who can undertake to say that the legislature of 1847 violated the constitution by calling that a special case? If they are to be condemned as violators of the constitution, the legislature of 1848, and the commissioners of the code, must share the same fate.

Title four, § 33 of the code of procedure, enacts that "the county courts shall have jurisdiction in the following *actions* and proceedings." And what are they? "For the foreclosure or satisfaction of a mortgage and the sale of mortgaged premises within the county." A suit or action in the court of chancery, for the foreclosure or satisfaction of a mortgage, and the sale of mortgaged premises," was as well known when the con-

Beecher v. Allen.

stitution was adopted, as the action of assumpsit. An action of assumpsit was prosecuted in order to get a judgment, and issue an execution to sell the debtor's personal and real estate, to satisfy the debt; and a suit for the foreclosure or satisfaction of a mortgage, or a sale of the mortgaged premises, is also to coerce the payment of a debt by the sale of a man's real estate; and the one is no more a special case than the other. The act of 1847 did not give to the county courts jurisdiction in all actions of assumpsit; nor does the law of 1848 give to those courts jurisdiction in all suits for the foreclosure of mortgages. The act of 1848, (the code of procedure,) gives to the county courts jurisdiction in suits or actions for the partition of lands in their respective counties. Suits or actions for the partition of lands, are no new inventions, and can no more be called special cases than any other actions. But when restricted to the lands in a particular county, they may be called special cases. Partition was a regular real action, in which there were two judgments, and it can no more be called a special case than an action of assumpsit, or any other action. It is true, that the mode of proceeding in partition has been changed; and so it has in all other actions. And if by changing the mode of proceeding in partition, it is now a special case, the great change made in proceedings in all other actions, has transformed them all into special cases; and the legislature of 1847, no more exceeded its power by giving jurisdiction to county courts in actions of assumpsit when all the defendants reside within the jurisdiction of the court, and the damages demanded do not exceed two thousand dollars, than the legislature of 1848 did by giving to the same courts jurisdiction in partition, when all the lands of which partition is sought are in the same county.

The judgment of the county court must be affirmed.

PAIGE, J. concurred in the result of the foregoing opinions.

HAND, J. not having heard the whole argument, gave no opinion.

Judgment affirmed.

SAME TERM. *Paige, Willard, and Hand*, Justices.

GILLET, receiver of the St. Lawrence Bank, vs. MOODY.

Banks formed under the act to authorize the business of banking, passed April 18th, 1838, are not within the provisions of the revised statutes. (1 R. S. 591, §§ 1, 8, 9.)

Where a bank formed under that act agreed with the defendant, one of its stockholders, that in consideration of his anticipating the payment of his bond and mortgage for \$5000, given to the bank, for his stock, and surrendering his stock to them, they would transfer to him five Arkansas bonds of \$1000 each, which were then worth about 18 cents on the dollar, it was held that the agreement was not void; and the same having been executed by the defendant, a bill filed in behalf of the bank, which sought to set it aside, without offering to restore the defendant to the same condition in which he was before the agreement, was dismissed.

Banks formed under the general banking law are corporations.

IN EQUITY. The bill in this cause was filed before the chancellor, on the 24th of October, 1843, to set aside a certain agreement made by the directors of the St. Lawrence Bank with the defendant, one of the stockholders, in December, 1841, by virtue of which the defendant paid up a bond and mortgage given by himself to the said bank for five thousand dollars and surrendered his stock, on receiving five one thousand dollar bonds of the Arkansas stock. An answer was put in and proofs were taken, when the cause was referred to the vice chancellor of the third circuit. The cause was heard on pleadings and proofs, by the assistant vice chancellor of the first circuit, sitting for the vice chancellor of the third circuit, and on the 10th of April, 1847, the bill was dismissed by him with costs. The complainant thereupon appealed to the chancellor, and the appeal was transferred to this court, by force of the new constitution and the judiciary act of 1847. The facts are sufficiently stated in the opinion of the court.

A. Mann, Jr. for the appellant.

J. Rhoades, for the respondent.

Gillet v. Moody.

By the Court, WILLARD, J. The St. Lawrence Bank was organized in the year 1838, by virtue of the act entitled "An act to authorize the business of banking," passed April 18, 1838; and commenced its business in the fore part of the year 1839, in the village of Ogdensburgh, in the county of St. Lawrence, and so continued until its suspension. About the third of December, 1841, the bank, by a formal resolution of its directors, suspended specie payments, and the redemption of its circulating notes at its agencies; and never afterwards resumed specie payments, or the redemption of its circulating notes, either at its counter, or elsewhere. On the twenty-third of December, 1841, the bank, having a large amount of bonds and mortgages, deposited with the comptroller, as security for circulating notes, and a large amount of Arkansas state stock, which was greatly depreciated in value, proposed to the defendant, who was a stockholder of the said bank to the amount of five thousand dollars, and also one of the directors, that if he would pay up his bond and mortgage, given for his stock, which did not in fact become due till 1843, and surrender his stock to the bank, the latter would, in consideration thereof, transfer to him five Arkansas bonds of one thousand dollars each. This proposition was accepted by the defendant, and he, in February, 1842, in pursuance thereof, paid up in full the bond and mortgage for five thousand dollars, given originally for his stock, and surrendered his stock to the bank; and received the five Arkansas bonds of the nominal amount of one thousand dollars each. It is stated by the defendant that these bonds were at that time, worth but about eighteen cents on the dollar, and the proof shows that they were not worth much beyond that sum. Sometime in the winter of 1841-2, the bank commissioners filed a bill against the St. Lawrence Bank, and obtained an injunction, which was served on the cashier of the bank, on the tenth of March, 1842. It is admitted that Mr. Gillet was appointed the receiver of the effects of the bank, by an order of the chancellor in that suit, made on the twenty-fourth of February, 1843; and that the bank shortly afterwards executed the usual assignment to him of all its property. The

Gillet v. Moody.

object of this bill is to annul the said agreement between the defendant and the bank, and to compel the former to surrender to the receiver the aforesaid Arkansas bonds.

The facts which arise out of the pleadings and proofs justify the assumption that the bank, at the time it suspended specie payments, was in fact insolvent. There is room, however, to believe that the defendant and the officers of the bank were confident, at that time, that its assets were more than enough to pay its debts, and that if the stockholders, whose stock was secured by bonds and mortgages, would anticipate the payments, the bank might be able to resume business and wind up its affairs without loss to its creditors. Subsequent events, however, show that they were mistaken in this assurance, as the bank was, probably, at that time, unable to pay all its debts, with its own means.

Although the St. Lawrence Bank was a corporation constitutionally formed, (see *Gifford v. Livingston*, 2 Denio, 380, and *Warner v. Beers*, 23 Wend. 103,) yet we think it is not subject to all the provisions in the statute "to prevent the insolvency of moneyed corporations." (1 R. S. 588. *Gillet v. Campbell*, 1 Denio, 520.) In the last mentioned case, Bronson, J. expressly holds that the eighth section is inapplicable to the free banks; and if so, the ninth section is inapplicable also. And it seems to us that the first section falls within the same category, as it contains only imperative prohibitions against the performance of certain specified acts by the *directors* of moneyed corporations—a class of officers not required by the charter of the St. Lawrence Bank.

The question, then, arises whether the agreement which the bill seeks to annul was in fraud of the creditors and stockholders of the bank. It is a general rule that corporations can only exercise the powers, and carry on the business, which the statute under which they are created has authorized them to exercise and carry on, either in terms or by necessary implication. (*Per Walworth, chancellor, in Safford v. Wyckoff*, 4 Hill, 443.) And it is equally well settled that they can only act in the manner prescribed by law. (*Per Marshall, Ch. J.*

Gillet v. Moody.

in *Head and others v. The Providence Ins. Co.*, 2 Cranch, 167.) The fourth section of title four, chapter eighteen, of the first part of the revised statutes, (1 R. S. 603,) enacts, as far as is applicable to this case, as follows: "Whenever any incorporated company shall have refused the payment of any of its notes, or other evidences of debt, in specie, or lawful money of the United States, it shall not be lawful for such company, or any of its officers, to assign or transfer any of the property or choses in action of such company, to any officer or stockholder of such company, directly or indirectly, *for the payment of any debt*; and it shall not be lawful to make any transfer or assignment *in contemplation of the insolvency* of such company, to any person or persons whatever; and every such transfer and assignment to such officer, stockholder, or other person, or in trust for them, or for their benefit, shall be utterly void." The supreme court, in *Bowen v. Lease*, (5 Hill, 221,) held this section applicable to the act incorporating the Erie Rail-Road Company; and there cannot be a doubt, we apprehend, that it is a branch of those regulations to which all corporations are subject, which are not expressly exempted by law. But the obvious answer to the application of the section to this case is, that the defendant was not a *creditor of the bank*, but a debtor; and the agreement to assign the Arkansas stock was clearly not made in contemplation of the insolvency of the bank, in order to give the defendant an undue advantage over the other stockholders and creditors of the institution, but to prevent its insolvency, and thus enable it to discharge all its obligations. The object of the statute is to prevent fraudulent preferences being given by an insolvent corporation to its officers, stockholders and favorite creditors. The facts fail to bring this case within the category for which the statute was enacted.

There is nothing in the pleadings or proofs to show that it was not for the interest of the creditors that the bargain in question should be carried out according to its terms. Indeed some of the witnesses testify expressly that the contract was for the interest of the bank; and none has shown that the bank would have been better off had the arrangement not been

Gillet v. Moody.

made. The contract was neither against the statute, or public policy. It was upheld by a valuable consideration, the payment in advance of a sum of money not due under a year. And at that time the stock of the bank was probably esteemed to be of as much value as Arkansas bonds. Both were below par, and which would ultimately be worth the most could not then be determined. Each party incurred a risk, without any guaranty of the value of the property exchanged. The bank surely was as competent to know the value of its own stock as the defendant. There was in short no fraud in the matter.

There is no doubt of the principle that the creditors of an insolvent corporation are entitled first to be paid out of the assets of the company, before the stockholders can be reimbursed for their stock. (7 *Paige*, 198.) Nor is there any doubt that the stockholders of an insolvent company, who have not paid the full amount of their stock, are liable to the creditors of the corporation to the extent of what remains unpaid upon their several shares of such stock, or of so much as may be necessary to supply the deficiency in the assets of the corporation to pay its debts. (10 *Paige*, 290. 9 *Id.* 152.) But the principle is inapplicable to this case, because the defendant did pay the full amount of his stock. The complainant cannot succeed in this case unless he can impeach the fairness of the transaction. He has, in our judgment, failed to show any actual fraud in the agreement, or such inadequacy of consideration as would warrant the court in imputing a want of good faith to the officers of the bank, by whom the bargain was made. Nor should we lose sight of the fact, that the complainant does not propose to restore the defendant to the condition in which he would have been, had the contract not been made. He claims to hold the advantages acquired to the bank by the defendant's payment in advance, and the assignment of the stock of the institution, and to reclaim what the bank gave as the equivalent for those advantages. This is inequitable, and against the settled practice of the court.

We have already intimated a doubt whether the 1st section of article 1, title 2, chapter 18 of the 1st part of the revised

 Arnold v. Gilbert.

statutes "of moneyed corporations," was applicable to this case ; but if it is applicable, we are of opinion that the remedy for a violation of the duties therein enjoined upon the directors of the institution, is the personal liability imposed by the 10th section of the same article, (1 R. S. 591,) upon every director who shall violate it, in favor of the creditors and stockholders respectively, to the full extent of any loss they may respectively sustain from such violation.

On the whole, there is no error in the decree of the assistant vice chancellor in dismissing the bill with costs, and it must be affirmed.

Decree affirmed.

NEW-YORK GENERAL TERM, January, 1849. *Hurlbut, McCoun, and Edwards*, Justices.

ARNOLD and others vs. GILBERT and others.

Where a testator, by his will, mentioned several *particular* purposes for which he authorized sales of his real estate to be made, viz: the payment of debts, and certain specified legacies, and then the residue of his estate, real and personal was devised to the executors in trust, and they were expressly directed and required to sell the same for the *general* purpose of dividing it into shares of sevenths, and distributing such shares among the children and grandchildren of the testator; *Held* that although the *particular* purposes of the will might only require a partial conversion of the realty into personalty, yet that the *general object* and scope of the will rendered it evident that sales of the whole real estate were intended, for the general purposes of the will; and that this amounted to a conversion of the same into personalty, to all intents; and that the beneficiaries took the same as personal property.

Held also that the fact that no time was fixed, within which sales were to be made, and that it was left to the discretion of the executors to effect sales from time to time *when*, and in the best *manner* they could, did not alter the case; their duty, in regard to effecting sales, being as imperative as though the testator had specified a time within which sales should be made and the whole estate divided.

Arnold v. Gilbert.

Where no time is specified for the performance of such a trust, a *reasonable time* will be allowed; and should it be unreasonably delayed, a court of equity will interfere, and compel a performance.

Where a testator, after directing the sale of all his real estate, by his executors, for the general purposes of his will, gives the executors ample powers to lease lots for terms of years, to insure, rebuild and repair houses, and to sell, purchase and exchange gores, strips, or pieces of land, the granting of such powers to them will not be deemed as interfering with the paramount duty of selling the real estate, according to the ultimate design and object of the will. Until the real estate can all be sold, the power to manage it to the best advantage may be exercised, and is not inconsistent with the obligation to sell.

Persons taking the beneficial ownership of property, under a will, take it in the character which the testator has thought proper to impart to it. If he gives money, to be laid out in land, then it vests as land. If land is devised to be sold, and the proceeds are given over, they become personalty, and vest and pass as such.

The principle on which the doctrine of conversion rests is, that whatever, in a will or other instrument, is directed or agreed to be done is, in equity, considered as already performed.

The general rule is to date the conversion as taking place on the death of the testator; unless there is something special in the power of sale, making its exercise, or performance, depend on the happening of some event or contingency to arise subsequently, or on the discretion of the executor or trustee to sell, or not. But if the direction is imperative, requiring a sale at all events, and leaving it discretionary only as to the time and manner of selling, then the sale, when made, has the same effect, in respect to the rights of the parties in interest, as though made immediately.

A general power in trust, the execution or non-execution of which does not depend on the mere volition of the trustees, is imperative in its nature, and imposes a duty, the performance of which may be compelled in equity.

Where the execution of a general power in trust to sell real estate, unlimited as to time, is not made to depend on the happening of any event which might possibly carry it beyond the duration of two lives in being, the validity of such power cannot be objected to on the ground that it unduly suspends the alienability, or absolute ownership of the property.

The 63d section of the statute of uses and trusts, respecting trusts for the receipt of the rents and profits of lands, ought not to be extended by the courts, because of the *analogy*, to trusts of personal property. *Per McCoun, J.*

A testator, by his will, gave to his wife, for life, in lieu of dower, a third of the net rents of his real estate, so long as it should remain unsold. At her death this third was to be divided into equal sevenths, one-seventh being given to each of the testator's sons, G., D. and C., absolutely, and one-seventh to E. F. for life, or so long as she should remain single, and at her death or marriage, to her children or next of kin absolutely, as in case of intestacy. *Held* that these were all valid gifts; that the bequest to E. F. would vest an absolute ownership in her personal representatives at her death, (if it did not sooner

Arnold v. Gilbert.

vest in her children, by her re-marriage;) and that her death would be but the termination of a second life estate in so much of the fund.

By the same will the interest of one other seventh of the capital set apart for the use of the widow was given to Mrs. H. during life, or while she remained single; and at her death, or re-marriage, the principal of her share was to revert and become a part of the residuary estate of the testator to be divided into six parts between his five sons and E. F, his daughter, she to take her sixth of this seventh in the same manner as she took her original one-seventh; the limitation being the same. And the sons, G., D. and C., each took his sixth of Mrs. H.'s seventh absolutely. By the 19th section of the will the original seventh of the capital, and one-sixth of Mrs. H.'s seventh, given to two other sons, George and W., were placed in trust for investment, and the interest only was to be paid to them respectively, during their lives, and the remainder to their children; but in the event of either, or both, dying without children then living, their shares were to fall back into the estate, to be again divided equally between the sons G., D. and C., and whichever of George and W. should survive the other. And to the survivor the interest was limited for life, and the principal was to be divided after his death, in the manner directed in respect to his original seventh part. *Held* that the effect of the 19th section of the will, so far as George and W.'s shares of the estate generally were concerned, was to give to them, by way of cross-remainders, a contingent interest for life in each other's shares; a contingency depending on the event of either dying without children living at the time of his death, and therefore operating in law to prevent the vesting of an absolute ownership in their respective shares, at their deaths, both as to their original sevenths and as to their sixths of the seventh given in the first instance to Mrs. H.

Held also, that the vesting of an absolute ownership in their original sevenths was not thereby postponed beyond two lives, nor was it so postponed in their sixths of Mrs. H.'s seventh, except in her seventh of the one-third set apart in the first instance to the widow's use. That in that one-third there was first a life estate in her, then a remainder for life in one-seventh of the third to Mrs. Hunt, and then a remainder over of a sixth of that one-seventh to each of the sons, George and W., but not so limited as to vest in either of them an absolute ownership, on the death of Mrs. H. And that the limitations in favor of their children as purchasers, or takers in their own right, or to the children of the survivor, and in case none were living at their decease, then to others, were too remote, and of no effect in law.

IN EQUITY. This was an appeal, by the defendants, from a decree of the late vice chancellor of the first circuit, declaring the invalidity of the last will and testament of the late William W. Gilbert deceased. The case before the vice chancellor, with his decision thereon, is reported in 3 Sandford's Chancery Reports, 531; where the facts are fully stated.

Arnold v. Gilbert.

E. H. Owen, C. O'Connor & Geo. Wood, for the appellants:

Edward Sandford, for the respondents.

By the Court, McCoun, J. The first question which we are to consider in this case is, whether by the will of the late William W. Gilbert his real estate as devised, is equitably converted into personalty to all intents; or in other words, whether the beneficiaries under it take the estate as real or as personal property?

The testator gave to his wife (among other things) one-third of the rents, issues and profits of his real estate for life, to be paid to her so long as his real estate should remain unsold, (and when sold her thirds to be paid according to directions subsequently given concerning it,) and the use of his mansion house for a year—all of which are in lieu of dower. He then gave to five of his sons, each a legacy of \$5000, payable out of his real and personal estate as thereafter directed; and to another son (Ephraim) the interest of \$3000 for life, that sum to be raised from his personal and real estate. And to a deceased son's widow he gave the interest of \$10,000 so long as she should remain a widow, to be raised from the sales of his real estate, the principal afterwards to be equally divided between her three daughters, (grandchildren of the testator;) and to two of such grandchildren he gave each a legacy of \$1000 in addition. The testator then, by the 10th section of the will, devised all the residue of his estate both real and personal to the five persons named as executors of the will, as joint tenants, *in trust*: 1st. To take, have, hold, use and possess all the real estate, from and immediately after his death, excepting the mansion house, and that also, after his wife's occupancy of it for a year, and to receive the rents and profits thereof; 2d. From and immediately after his death to sell any part of the real estate which might be necessary to pay debts; 3d. After his wife's third of the net amount of all the rents is taken out, then to pay out of the residue, the interest on the legacies to the respective legatees—the interest to commence six

Arnold v. Gilbert.

months after his death, and if not sufficient to pay the interest in full to all, then the same to be paid ratably; 4th. From time to time *to proceed and sell any part, or all*, of his real estate, either at private sale or at auction, and to convey the same in fee simple to purchasers; 5th. Upon every sale, at least one-third of the purchase money to be left on bond and mortgage, if it can be done; that being his wife's right in lieu of dower, so that if she should live until his real estate should all be sold, her interest might be safely placed and made secure. This is by way of recommendation. 6th. He directs that the sales of the real estate shall be made with a view to *invest* the sums required and to *pay* the legacies with as little delay as possible, always having a regard for the *interest* of the *whole* estate, as well as of the *particular* legatees; it being his will that the pecuniary or other devises shall be carried into effect and consummated from the *funds resulting from or arising out of the real estate*. Then by the 15th section of the will, is this further trust declared; "that upon a sale and final distribution of the estate, there shall be an estimate—an account taken of the whole remaining—and the surplus, including the sum placed at interest for the son Ephraim for his support during life, as well as the funds for the use of his wife during her life, be divided and distributed in the following manner, *whenever, as soon, and as often*, as can be done to the *close and settlement* of the whole estate and its concerns;" that is to say, one-seventh part to each of his sons, Garret, David, Clinton, George and Warren, and the interest of one-seventh to each of his daughters, Mrs. Hunt and Mrs. Fish. The trusts and limitations over of the shares of Mrs. Hunt and Mrs. Fish, and of the two sons George and Warren will be afterwards noticed.

Now here are several *particular* purposes for which sales of the real estate are authorized and directed by this will; first, the payment of debts if necessary; next the payment of the legacies to the five sons, and the \$3000 to be set apart for the use of Ephraim, and the \$10,000 to be raised and set apart for the use of the deceased son's widow and her children, and the additional \$2000 to two of such children; and then there is

Arnold v. Gilbert.

the *general purpose*, for which all the residue of the estate, both real and personal, is devised to the executors in trust, and which they are expressly directed and required to sell, viz. the final division of it into shares of sevenths, and the distribution of such shares among the children and grandchildren of the testator. The *particular* purposes of the will above mentioned might only require a partial conversion of the realty into personalty, but when the *general object* and scope of the will is looked at, it is very clearly to be seen that sales of the whole real estate are intended for the *general* purposes of the will; and that this amounts to a conversion "out and out," or to all intents, would seem not to admit of a doubt. (*Kane v. Gott*, 24 *Wend.* 641.)

That no time is fixed within which sales are to be made, and that it is left to the discretion of the executors to effect sales from time to time, *when*, and in the *best manner* they can, does not alter the case. Their duty in regard to effecting sales is as imperative, upon a fair construction of this will, as though it had *specified a time* within which sales should be made and the whole estate divided. Where no time is specified in such cases, for the performance of the trust, a *reasonable* time will be allowed; and should it be unreasonably delayed, a court of equity will interpose and compel performance. (1 *Hov. Supp.* 105.)

It is said, however, that one-third of the real estate might remain unsold during the life of the widow, because the will would be complied with, in respect to her and her rights under it, by the executors continuing to pay her one-third of the net rents as long as she lived. This is true. Still their power to sell the whole at any time, (including the one-third,) remains unimpaired, and the necessity of doing so for the ultimate purpose of the will, is not thereby lessened. The probability of the whole being sold in her lifetime, appears to have been in the contemplation of the testator; since he directs the interest of one-third of the purchase money to be paid to her, instead of one-third of the rents. Nor does the fact that very ample powers are given to the executors, by the will, to lease out lots

Arnold v. Gilbert.

(parts of the estate,) for terms of years to insure houses and rebuild and repair, in case of loss by fire, and to look after corporation assessments, and to sell, purchase, and exchange gores, strips, or pieces of land with other owners, interfere in the least with the paramount duty imposed upon them of sooner or later effecting sales of the whole property according to the ultimate design and object of the will. Until the property can all be sold, the power to manage it to the best advantage for the interest of those concerned, may be exercised, and they are not inconsistent.

No principle is better established than this, that those who take the beneficial ownership of property under a will, take it in the character which the testator has thought proper to impart to it. If he gives money to be laid out in land, then it vests as land. If land is devised to be sold and the proceeds are given over, it becomes personalty and vests and passes as such. That the will in question, in all its gifts, is governed by this principle, seems to me very clear. *Money* to be produced by the sale of land, and not *land* itself, is directed to be divided from time to time; and at the close and final settlement and distribution into shares of sevenths, it is *money only* which the beneficiaries are to take. All the directions of the will in relation to the trust shares of the two daughters and two of the sons, refer to their shares as funds or money to be loaned out at interest or invested in stocks. This is likewise a case in which the conversion is to be considered as having taken place at the death of the testator, when the will went into effect. The principle on which the doctrine of conversion rests is, that whatever in a will or other instrument, is directed or agreed to be done, is in equity considered as actually performed. (*Craig v. Leslie*, 3 *Wheat.* 563. *Kane v. Gott*, 24 *Wend.* 660.) The general rule is to date the conversion as taking place on the death of the testator, unless there is something special in the power of sale, making its exercise or performance depend on the happening of some event or contingency to arise subsequently, or on the discretion of the executor or trustee to sell or not. But if the direction is imperative, requiring a sale at

Arnold v. Gilbert.

all events, and leaving it discretionary only as to the time and manner of selling, then the sale when made, has the same effect, in respect to the rights of parties in interest, as though made immediately. (*Leigh & Dalzell*, 48. *Casamajor v. Strobe*, cited in note, 19 *Ves.* 390.) In *Hutchin v. Mannington*, (1 *Ves. jr.* 366,) Lord Thurlow expressed himself very strongly on the point, that if real estate was devised upon trust to sell in a *reasonable* time, or with all possible diligence, it would not depend upon the caprice of the trustee to sell, nor upon his dilatoriness. In some way it could be sold immediately, and therefore should be considered as sold from the testator's death. Lord Eldon admitted the soundness of that general proposition in *Sitwell v. Bernard*, (6 *Ves.* 536,) and in *Gaskell v. Harman*, (11 *Id.* 489, see pp. 497, 507.) And in *Walker v. Shore*, (19 *Id.* 386,) where the devise of copyhold estate was to executors in trust "to sell in such manner and at such time as they should think proper," it was held by Sir W. Grant, M. R. that these words, though of large discretion, did not make the right of the person who was to have the benefit of the proceeds for life, dependent on the *time* at which the sale should actually take place. The trustees could not arbitrarily postpone the sale to an indefinite period. Some fixed rule was necessary, by which to determine the rights of parties, and by which to hold the conversion to have been made at some given period, just as much as if the trustees had been directed to sell "with all convenient speed."

In *Fitzgerald v. Jervoise*, (5 *Mad. Rep.* 25,) it was held that a devise to a trustee to sell the real estate with "all convenient speed," after the death of a tenant for life, was *prima facie* a direction for an *immediate* sale after such death, and entitled the beneficiary of the fund to the rents which had accrued intermediate the death of the tenant for life and the time of the actual sale, which had been somewhat delayed by the trustee. See also *Ashby v. Palmer*, (1 *Mer.* 296,) to the same effect, and *Leigh & Dalzell*, 57, for the rules deducible from the adjudged cases.

This question as to the *time* when the conversion is effected,

Arnold v. Gilbert.

is perhaps not very important to the case in hand. Such questions generally arise between an heir and the personal representatives of legatees or devisees dying before actual conversion; but such is not the controversy at present.

With regard to the power in this will by which the conversion is produced, it may be observed that it is a "general power in trust," and its execution or non-execution not depending on the mere volition of the trustees, is imperative in its nature, and imposes a duty, the performance of which may be compelled in equity. (1 R. S. 734, § 94, 96.) And further, the execution of the power not being made to depend on the happening of *any event* which might possibly carry it beyond the duration of two lives in being, no objection arises that it unduly suspends the alienability or absolute ownership of the property. Neither is there any valid objection to it as *a trust* on account of the *purposes* for which it is granted; the statute allowing of trusts to sell for the benefit of creditors and legatees.

This estate, then, in the hands of the trustees, being treated *as money*, we are next to inquire whether any thing in the *trusts* or *limitations* over of any of the shares or portions into which it is divided, are contrary to law?

In considering this branch of the case it is only necessary to apply to it the rule of law as prescribed by the statute in relation to expectant estates in personal property. Trusts may be created of such property; future and contingent interests in it may be given; and all that the policy of the law requires is, that the absolute ownership shall not be suspended by any limitation or condition annexed to the gift, for a longer period than during two lives in being at the death of the testator, if the gift is by will; and in all other respects, that the limitations of future or contingent interests in this species of property shall be subject to, and not transcend the rules also prescribed by statute, in relation to *future estates* in *lands*. (1 R. S. 773, §§ 1, 2.)

A strong argument has been presented on the hearing against the late chancellor's doctrine in a number of cases decided by him, that the 63d section of the statute of *uses and trusts* is to

Arnold v. Gilbert.

be applied by *analogy to trusts of personal property*. We are inclined to think with Cowen, J., (see 24 *Wend.* 666, 667,) that a statutory provision which has reference only to trusts for the *receipt of the rents and profits of lands*, ought not to be extended by the courts, because of the analogy, to trusts of personal property. And if necessary to this case we are prepared to say that the 63d section has no application.

There are only two portions of the estate in regard to which the limitations over present any serious question of being too remote. The first is the one-third of the capital set apart for the widow's use during her life. At her death this third is to be divided, as forming part of the residuary estate, into equal sevenths. One seventh goes to Garret, absolutely. One seventh to David, in like manner. One seventh to Clinton, in like manner. One seventh to Elsey Fish for life, or so long as she remains single, and at her death or re-marriage, to her children or next of kin, absolutely, as in case of intestacy. All these are clearly valid gifts. That to Mrs. Fish will vest an absolute ownership in her personal representatives, at her death, (if it does not sooner vest in her children by her re-marriage.) And her death is but the termination of a second life estate, in so much of the fund.

The interest of one other seventh is given to Catharine Hunt during life, or while she remains single. At her death or re-marriage the principal of her share, less \$5000 taken out and invested for her daughter Matilda Vail during life, with remainder to the daughter's heirs, (next of kin,) reverts and becomes a part of the residuary estate, to be divided into *six* parts between the five sons and the daughter Elsey Fish, she to take her sixth of this seventh in the same manner as she takes her original one-seventh, the limitation being the same.

The sons, Garret, David and Clinton, each take their sixth of Mrs. Hunt's seventh in the same manner as they take their original sevenths—that is, absolutely. By the 19th section of the will, however, George and Warren's original sevenths and their sixths of Mrs. Hunt's seventh, are placed in trust for investment, and the interest only is to be paid to them respec-

Arnold v. Gilbert.

tively during their lives, and the remainder to their children ; "but in the event of either or both dying without children then living," their shares fall back into the estate, to be again divided equally between the sons, Garret, David and Clinton, and whichever of the two, viz : George and Warren, happens to survive the other. And to the survivor the *interest* is still limited for life, and the principal is to be divided after his death, in the manner directed with respect to his original seventh part. The effect of the 19th section of the will, so far as George and Warren's shares of the estate generally are concerned, is to give by way of cross-remainders a contingent interest for life in each other's shares—a contingency depending on the event of either dying without children living at the time of his death, (a possible if not a probable event,) and therefore operating in law to prevent the vesting of an absolute ownership in their respective shares, at their death. This is so both as to their original sevenths and as to their sixths of the seventh given in the first instance to Mrs. Hunt. The vesting of an absolute ownership in the former, however, is not thereby postponed beyond two lives ; nor is it so postponed in their sixths of Mrs. Hunt's seventh, *except* in her seventh of the *one-third* set apart in the first instance for the widow's use. In that one-third there was first a life estate in her, then a remainder for life in one-seventh of the third to Mrs. Hunt ; and then a remainder over of a sixth of that one-seventh to each of the sons, George and Warren ; but not so limited as to vest in either of them an absolute ownership on the death of Mrs. Hunt. The limitations in favor of their children as purchasers or takers in their own right, or to the children of the survivor, and in case none are living at their decease, then to others, are too remote and of no effect in law ; and hence it is that there is here an intestacy as to two-sixths of one-seventh of a third, which is equal to a sixty-third part of the whole estate.

The other portion of the estate about which a similar question is made, is the \$3000 set apart for the benefit of Ephraim during life.

By the 7th section of the will this sum, after the death of

Arnold v. Gilbert.

Ephraim, is expressly given "to be equally divided between the five sons, including Warren and George, their executors, administrators and assigns, share and share alike"—words importing absolute vested gifts. But by the 15th section, it would seem as if this \$3000 was to be included in the final distribution, and to be divided into seven parts, George and Warren each taking a seventh of it under the trust and subject to the limitations declared in the subsequent 19th section. It is the duty of the court to reconcile this seeming incongruity and repugnancy, if it can be done without doing violence to any of the expressions of the will. In the first place it may be observed that the language of the 7th section is clear and explicit, in dividing the \$3000 into five parts and giving to each son an absolute ownership. There is no ambiguity in that part of the will; while the 15th section is so framed as to admit of some latitude of construction and meaning. It speaks of what shall be done "upon a sale and final distribution of the estate," and it authorizes distribution to be made "*when-ever, as soon, and as often* as can be done to the close and settlement of the whole estate and its concerns." These words show that the testator expected dividends to be made from time to time, and in making the estimate or account for the final settlement and distribution, the Ephraim fund and the widow's third are to be included. But suppose those funds have been divided and paid over previous to the final distribution, as they might be on the dropping of the lives, then of course the parties would be charged with the amounts paid to them as so much on account of their sevenths of the estate. The will very clearly allows this to be done. And so, if at the time of making the final settlement and distribution, the fund of \$3000 is not ready to be divided, (Ephraim being still alive,) yet as the other five sons are to receive it at his death, each of them may be charged with a fifth of the amount, as so much towards his general residuary share in like manner.

In this way the will is complied with, and the 7th and 15th sections are made to harmonize. As George and Warren take their shares of the \$3000 absolutely, according to the 7th sec-

Arnold v. Gilbert.

tion, the same are not necessarily brought under the trust declared in and by the 19th section. The "part or portion" there spoken of as given to George and Warren, must be understood as the part or portion given to them by the 15th and 17th sections of the will. It is not to be supposed that those words were intended to embrace the legacy of \$5000 previously given to each of them by the 6th item of the will, because the trust of those legacies had already been fully declared; and there is less reason to believe that the testator intended the trust should embrace their portions of the \$3000, after using words so strongly expressive of absolute gifts as he had just used in relation to the shares of that money.

After a careful examination of all the other trusts and limitations contained in this somewhat complex will, we find nothing more to condemn, than the limitations over, of the two-sixths of Mrs. Hunt's seventh of one-third of the estate; as to which there is virtually an intestacy. But this has not the effect of disturbing the whole will. All the other provisions, trusts, powers and limitations remain in full force. The decree appealed from, made by the late vice chancellor, invalidating the whole will, must therefore be reversed, except so far as it sets aside the trust of one sixty-third part of the whole estate, which portion remains undisposed of by the will and is to be distributed as in case of intestacy, among the next of kin of the testator. The decree now to be entered may provide for the taking of an account of that part of the proceeds of the estate and for the distribution of it according to law; first, however, taking out of it the costs of this suit to all the parties who have appeared and litigated it; which costs we think should be borne by this fund and not by the defendants personally, nor by any other portion of the estate.

SAME TERM. *Before the same Justices.*

JOHN MILLER and WILLIAM MILLER *vs.* THE PEOPLE.

5 208
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On the trial of an indictment for a misdemeanor, in exposing the bodies of the defendants, naked and uncovered, to the public view, the *intent* with which the act was done is a material ingredient in the offence, and is a question of fact, for the consideration of the jury, under all the circumstances of the case.

It is for the jury to find whether there has been an intentional, wanton and indecent exposure of the persons of the defendants, at such a time and place, and in such a manner, as to offend against public decency. And a charge which withdraws that question from the consideration of the jury, as a question of fact, is erroneous.

ERROR to the general sessions of the city and county of New-York. The facts appear from the opinion of the court.

John Cook, for the plaintiffs in error.

J. McKeon, (district attorney,) for the people.

By the Court, HURLBUT, P. J. The defendants were indicted for that being scandalous and evil disposed persons, and contriving and intending the morals of divers good and worthy citizens to debauch and corrupt, on the twelfth day of July, 1847, at the city and county of New-York, in the presence of divers good and worthy citizens of this state then and there being, in a public manner, unlawfully, scandalously and wickedly did expose to the view of the said persons so present, the bodies and persons of them, the said defendants, naked and uncovered, for the space of one hour, to the manifest corruption of good morals, &c.

The evidence shows that the defendants, early in the morning of the day stated, went out of their house into the back yard of the premises which they occupied, without having completed their toilette. The witness Deere testified that while he was out looking at flowers he discovered that one of them was not dressed—that all his clothes were off but his under gar-

Miller v. The People.

ment, and that in fact, he stood in his shirt near the back door of his house. The other defendant walked in the yard with his shirt on, and with his clothes down about his feet. Mrs. Deere was on the alert and called her husband's attention to this circumstance. The defendants were shown to have been bachelors, advanced in years, and entertained no females about their premises. There was a fence about five feet high surrounding the yard in which the offence was alleged to have been committed. But two or three persons were so unfortunate as to have observed the conduct complained of; and there was no satisfactory evidence to show that the defendants supposed they were seen by any body, or that they intended to expose their persons to the public view. Excepting two houses there were no dwellings within a quarter of a mile of their residence. The weather was probably warm, and it would seem that the defendants did not nicely consider of the fitness of their apparel. Mr. Deere, who complained, being on bad terms with them, appears to have watched their conduct narrowly. The defendants were shown to be inoffensive, laboring men, of fair moral character. They were, however, convicted and sentenced, each to pay a fine of two hundred dollars, and to stand committed till it should be paid.

The recorder charged the jury, in substance, that the evidence was positive as to the offence charged having been committed; that they were to find if the defendants had committed the offence charged in a manner to openly outrage decency; that as to the intent, the acts showed the intent; and if they were proved that was all that was necessary. That any acts that were injurious to good morals, and openly violated decency, were misdemeanors at common law. There was a general exception to this charge.

It is a general principle of evidence that a man shall be taken to intend that which he does, or which is the immediate and natural consequence of his act. But where an act in itself indifferent becomes criminal if it be done with a particular intent, then the intent must be alleged and proved. The intent in the present case was a material ingredient in the offence,

The People v. Duffy.

and was a question of fact, under all the circumstances, for the consideration of the jury. It was for them to find whether there had been an intentional, wanton and indecent exposure of the persons of the defendants, at such a time and place, and in such a manner, as to offend against public decency. The charge withdrew this from the consideration of the jury as a question of fact. The jury were told that the evidence was positive as to the offence having been committed, and in effect that if the acts were proved the defendants were guilty. This was erroneous, and as the substance of the charge is open to this objection, we think the defendants may avail themselves of it by a general exception.

The judgment of the general sessions must be reversed, and a *venire de novo* awarded.

SAME TERM. *Before the same Justices.*

THE PEOPLE *vs.* DUFFY.

After a person has been convicted, under the acts relative to *disorderly persons*, and committed to prison in default of sureties for good behavior, and a record of conviction has been *made and signed*, (though not filed,) the committing magistrate has no power, acting singly, to discharge the prisoner, or to take a recognizance for his good behavior.

The final commitment of the prisoner, after the record of conviction has been made and signed, completely exhausts the power of the magistrate, and ousts him of jurisdiction to take a recognizance.

ERROR to the New-York common pleas. The action was debt on a bond or recognizance entered into by Dennis Daly, and P. Duffy as surety, in the penalty of \$500. The suit was against the latter only. The recognizance was taken before James Hopeon, one of the special justices in the city of New-York, on the 18th of May, 1838, and recited that Daly had been duly convicted of being a disorderly person, that is to say,

The People v. Duffy.

a person who had neglected to provide for his wife, according to his means, for the last seven years. The condition was that Daly should be of good behavior for the space of one year. The breach assigned was that since the giving of the recognizance, to wit, on the 30th of May, 1838, Daly had further neglected to provide for his wife, but had abandoned her, and therein had not been of good behavior to her, &c. nor had he paid the said sum of \$500, whereby an action had accrued to the plaintiffs according to the provisions of the revised statutes entitled "Of disorderly persons," fifth title, twentieth chapter, first part, and of the act entitled "An act relative to the powers of the common council of the city of New-York, and of the police and criminal courts of the said city," passed Jan. 23, 1833, to demand and have of the said defendant the sum of \$500, &c. The defendant pleaded *nul tiel record*, and several special pleas. In his sixth plea, the defendant alleged, in substance, that before the making of the alleged recognizance, Daly was brought before the said James Hopson, upon a warrant issued by him, for examination, on a charge of being a disorderly person; and upon that examination it appeared to the said special justice, by competent testimony, that Daly was a disorderly person, and he convicted him of the charge, and required him to give sureties in the sum of \$500 for his good behavior for one year; that Daly made default in finding such sureties; and that the said special justice, before the making of the pretended recognizance, *made up, signed and filed* in the office of the county clerk, a *record* of the conviction of Daly, specifying generally the nature and circumstances of the offence; and that the said special justice did then and there, by warrant under his hand duly made, commit the said Daly to jail, there to remain until such sureties should be found, or until he should be discharged according to law. That after the making up, and filing, of such record of conviction, and after such commitment, and after Daly had been and whilst he was, in actual custody in jail in pursuance of the conviction and commitment, the said James Hopson, as such special justice, solely and without the concurrence or action of any other jus-

The People v. Duffy.

tice, did, on pretence of an authority derived from such conviction and commitment, exact and take from Daly and the defendant the said pretended recognizance, &c. ; concluding with a verification. To this plea the plaintiffs replied, that the record of conviction *was not filed* in the clerk's office, before the making of the recognizance in the declaration mentioned. The defendant demurred to the replication ; and the common pleas gave judgment for the defendant ; whereupon the plaintiffs brought a writ of error.

John McKeon, for the plaintiffs.

C. O'Connor, for the defendant.

By the Court, HURLBUT, P. J. The magistrate before whom Daly was brought, under the provisions of the laws of 1833, page 11, section 7, and the revised statutes, volume 1, pages 638, 639, adjudged and determined that he was a disorderly person, and required that he should give sureties in the sum of \$500, for his good behavior for one year. Daly having made default in finding such sureties, the magistrate made up and signed a record of conviction, specifying the nature of the offence committed by Daly, which was, that he had neglected to provide for his wife according to his means, for the space of seven years. This record was not filed in the county clerk's office according to the provisions of the second section of title 5, chapter 20, part 1, of the revised statutes, concerning disorderly persons ; but the magistrate, nevertheless, pursuant to the conviction, by his warrant committed Daly to the common jail of the city of New-York, there to remain until the requisite sureties should be found, or until he should be discharged according to law. The magistrate, after this conviction and commitment, and while Daly was in actual confinement in pursuance thereof, on pretence of authority derived therefrom, took from Daly and the defendant Duffy the recognizance which is the subject of this suit. The defendant objects, that under these circumstances, the recognizance was taken without authority and is void.

The People v. Duffy.

In our judgment the magistrate lost all jurisdiction of the matter when he signed the record of conviction and issued the warrant of commitment ; but if this were questionable, we do not entertain a doubt that such jurisdiction ceased when the warrant was executed. After this, the committing magistrate had no power to discharge Daly, and no authority to receive a recognizance, which could only be taken as a condition of his discharge, by two magistrates. (1 *R. S.* 639, § 6. 2 *id.* 705, § 14.) The justice violated his duty in not filing the record of conviction, before issuing the warrant of commitment ; but he did not thereby retain jurisdiction of the subject matter of the complaint, which he had completely adjudged and determined, nor of the person of the prisoner, whom he had finally committed to prison. In substance and effect he had exercised the whole power conferred on him by statute, and all further dealing with the prisoner and his case was thenceforth devolved on other officers or tribunals.

In the case of *The People v. Brown*, (23 *Wend.* 47,) the defendant had not been actually committed to prison before the recognizance was taken, but the record of conviction was alleged to have been made up, signed and filed ; and the court held that after this the justice lost all power singly to take the recognizance ; that the power was then devolved on two magistrates. In the present case, we are of opinion that the final commitment, after the record of conviction was made and signed, (though not filed,) completely exhausted the power of the officer, and ousted him of jurisdiction to take the recognizance.

The judgment of the common pleas must be affirmed.

SAME TERM. *Before the same Justices.*

FRITH and others vs. CROWELL and others.

The supreme court will not entertain jurisdiction of a complaint alleging that the plaintiffs are the owners of certain property, on which the defendants claim to have a lien for *salvage*; asking the aid of the court to determine whether such lien exists, and if so, to ascertain its extent, in order that the plaintiffs may redeem; and praying for the appointment of a receiver *pendente lite*.
The court of admiralty is the proper tribunal for that purpose.

THIS was an appeal from an order made by one of the justices of this court, at a special term, directing a reference for the appointment of a receiver *pendente lite*.

Charles Edwards, for the plaintiffs.

Griffin & Larocque, for the defendants.

By the Court, EDWARDS, J. The plaintiffs in this suit allege that they are the owners of certain property described in their complaint, on which the defendants claim to have a lien for salvage; and they ask the aid of this court to determine whether such lien exists, and if so to ascertain its extent, in order that they may redeem their property. They also ask for the appointment of a receiver *pendente lite*.

As a general rule a court of equity will interfere in favor of a party when its aid is necessary to ascertain the extent of a lien, which must be discharged before he can be entitled to redeem his property. But, in the case before us, there are insuperable difficulties in the way of the exercise of such a power. In the first place this is not a proper tribunal to try a question of salvage. This court never has exercised, and as we think ought not to exercise, such a jurisdiction. The court of admiralty is the proper tribunal for that purpose.

The only ground on which it could be contended that this court should exercise a power so foreign to its jurisdiction, and to which its forms of proceedings are so inadequately adapted,

Worrall v. Judson.

would be the necessity of the case. But no such necessity exists here; or, if it does, it is one which the plaintiffs have created by their own voluntary act. The salvors had libelled the property in question in a court of admiralty. The plaintiffs, by their intervention, prevented that court from interfering, not on the ground of any want of power in the court, but on the ground that the parties were all British subjects.

Under these circumstances we see no reasons why this court should assume jurisdiction in the matter.

The order for the appointment of a receiver must be reversed.

*N.Y. General Term, Hurlbut, McCoun &
 SAME TERM. Before the same Justices. Edwards J.*

WORRALL and others vs. JUDSON.

*2 Barb. 294
 Kern 149
 18.* was one of the original stockholders of the Rossie Galena Company, and at the time of contracting a debt to the plaintiffs, by the company, there had been no transfer, on its books, of the stock which had been owned by J., although he had, in fact, sold it, and had transferred his certificate of stock, with his name endorsed upon it in blank; Held that J. was liable to the plaintiffs as a stockholder, under the act of incorporation of the company.

THIS was an action of assumpsit brought against the defendant as a stockholder of the Rossie Galena Company, to recover from him the amount of a judgment against the company, in favor of the plaintiffs, for goods sold and delivered to the company while the defendant was a stockholder. The jury found a special verdict, stating, among other things, that at the organization of the Rossie Galena Company, the defendant was the owner of twenty shares of the stock of the company, which stood in his name upon the books of the company, and he continued to be such owner until the 10th of May, 1838, when, for a valuable consideration to him paid by Paschal Miller, he sold the same to him, and transferred and assigned them to him by

Worrall v. Judson.

delivering to said Miller the certificates therefor with the defendant's name endorsed thereon in blank. But said shares of stock continued to stand on the books of the company in the name of the defendant, and none of them were transferred thereon, to said Miller, or any other person, until after the sale and delivery of the goods by the plaintiffs to the company; that some of said shares still stood on the books of the company in the name of the defendant; and that the sale of his stock, by the defendant, was known to the officers and managing agent of the company soon after it took place.

A. C. Bradley, for the plaintiffs, moved for judgment in their favor, upon the special verdict.

H. E. Davies, for the defendant.

By the Court, EDWARDS, J. It appears by the special verdict in this case, that the defendant was one of the original stockholders of the Rossie Galena Company, and that at the time the goods, to recover the price of which this suit is brought, were sold to the company, there had been no transfer on its books of the stock which had been owned by him; although he had, in fact, sold it, and had transferred his certificate of stock, with his name endorsed upon it in blank. Upon this state of facts the question arises, whether he is liable as a stockholder, under the act of incorporation of the company.

It seems to me that, according to the decisions which have been made in this state, this can no longer be considered an open question. In the case of the *Utica Bank v. Smalley*, (2 Cowen, 770,) and of *Gilbert v. Manchester Iron Manufacturing Co.* (11 Wend. 627,) it was held that a stockholder in an incorporated company might transfer his stock in such a manner as to qualify himself as a witness, without showing a transfer on the books of the company; but the court did not pretend, in either of these cases, to decide what would be the extent of the liability of a person whose name stood upon the books of the company as a stockholder, after such transfer of

Worrall v. Judson.

his stock had been made. In the case last cited, they say that the rules, and by-laws, which require a transfer to be made on the books, have reference to the right of voting, or to the security of the company by way of lien upon the stock for any indebtedness of the stockholder, and do not incapacitate him from parting with his interest. They thus decide, by implication at least, that unless a transfer is made, as required by the act of incorporation, or by-laws of the company, a person whose name stands on its books will be entitled to vote, and will be liable for any amount which shall be due to the company upon the stock standing in his name.

The 9th section of the act incorporating the *Rossie Galena Company* declares that the stockholders of the corporation shall be jointly and severally personally liable for the payment of the debts contracted by the corporation. The 6th section declares that the stock shall be transferable on the books of the company. And the 8th section declares that the company shall be subject to the prohibitions and restrictions contained in title four, of chapter eighteen of the first part of the revised statutes. (*Laws of 1837, p. 445. 1 R. S. 604, 1st ed.*) By section eight of that title the right to vote on the stock of an incorporated company is confined to those persons whose names shall appear, on the transfer books of the company, to have the right to vote thereon. The person whose name appears as a stockholder, upon the transfer books, is, in respect to the right of voting at least, entitled to the privileges of a stockholder, although he may have sold his stock. Before a transfer on the books, the legal title is in him; and as he is entitled to the privileges, he should be subjected to the liabilities, of a stockholder.

The section in the act of incorporation of the company, which provides for the individual liability of its members, as was held in the case of *Allen v. Sewall*, (2 *Wendell*, 327,) and also in the case of *Moss v. Oakley*, (2 *Hill*, 265,) was intended to put the stockholders of the company upon the same footing, as to liability, as if they had not been incorporated. The parties then who ought to be held liable, are those who held themselves out as stockholders.

Worrall v. Jackson.

It was said, however, upon the argument, that if this were the case, it would place it in the power of the company to prevent a person from relieving himself from liability for its debts, by its refusal to make a transfer upon its books. It is not to be taken for granted that a company would wilfully be guilty of such an abuse of its power. And if it should do so, this court would undoubtedly grant the adequate relief. But if, on the other hand, a party should be permitted to transfer his stock by a mere assignment *inter partes*, and thus discharge himself from liability for the debts of the company, and still be permitted to keep his name on its books as a stockholder, with the right to vote at its elections, it might be that the whole control of the company would be in the hands of persons not responsible for its debts. It seems to me that the case of *Adlerly v. Storm*, (6 *Hill*, 627,) which is substantially analogous to this case, has settled the rule upon this subject.

In that case the stock of the Rossie Lead Mining Company had been transferred upon its books to the defendants, to secure a debt due to them. The debt was afterwards paid, and according to the agreement between the parties, the original stockholder was entitled to a retransfer of the stock. The parties, to secure whose debt the transfer had been made, returned the certificate of stock, and executed a power of attorney authorizing such retransfer. After the return of the certificate and execution of the power of attorney, but before a transfer was made upon the books of the company, it contracted the debt for the recovery of which the suit was brought. The court held that the persons whose names appeared on the books of the company as stockholders, were liable for its debts, although they had assigned their stock; that by the delivery of the certificate and the execution of the power of attorney the defendants only gave a power to transfer; and until the transfer was actually made they continued to be the legal stockholders.

In the case before us, as appears from the special verdict, the defendant, instead of giving a power of attorney, had done what was equivalent to it; he had endorsed his name on the certificate of stock which he had transferred, by which, accord-

Clayton v. Wardell.

ing to the decision in *Kortright v. Buffalo Commercial Bank*, (20 Wend. 91,) he gave the purchaser of the stock authority to write a power of attorney over his signature. The two cases, then, are in substance, precisely similar.

It follows that the plaintiffs are entitled to judgment for the amount claimed.

SAME TERM. *Before the same Justices.*

CLAYTON and wife vs. WARDELL and others.

Upon an issue as to the legitimacy of a child, it is not necessary to prove the actual marriage of the parents; but a marriage may be proved by evidence of cohabitation, reputation, and the acknowledgment of the parties.

But when there is evidence of an actual marriage, and the issue is as to the legitimacy of a child of such marriage, the marriage will not be rendered illegal, nor the issue of it declared illegitimate, by proof of a prior marriage, arising from cohabitation, reputation, and the acknowledgment of the parties.

THIS was an appeal by Clayton and wife, from a decree of the surrogate of the city and county of New-York, declaring that Mrs. Clayton was not the legitimate child of George Messerve deceased.

Harris Wilson, for the appellants.

C. W. Sandford, for the respondents.

By the Court, EDWARDS, J. The question at issue in this case is, whether Catharine Ann Clayton is the legitimate child of George Messerve deceased.

It appears by the testimony, that on the 3d of July, 1825, a marriage was publicly solemnized between George Messerve and Sarah Maria Youngs; and that Catharine Ann Clayton

Clayton v. Wardell.

is the issue of that marriage. It is contended, however, on the part of the respondents, that such marriage was illegal, on account of an existing matrimonial connection between the person calling herself Sarah Maria Youngs, and one Richard Schenck. The testimony given on the part of the respondents shows, that on the 18th of November, 1822, Sarah Maria Youngs made a complaint, by her affidavit, before a police justice, that she was then with child by Richard Schenck; and that on the same day, he entered into a recognizance with sureties, for his appearance to answer such complaint. Nothing further was done in the matter. It also appears by the testimony of several of the relatives of Schenck, and of other witnesses not related to him, that after this complaint had been made, the parties cohabited together, and were reputed, and acknowledged themselves to be, husband and wife; and that on the third day of June, 1825, they executed articles of separation, in which they described themselves as husband and wife. There is no proof of an actual marriage. On the other hand, two of the sisters of Sarah Maria Youngs, and two of her cousins, testify that she always went by the name of Youngs until she married Messerve; and it appears that she was married by that name.

It has long been a settled doctrine of the common law, both in England and in this state, that on an issue as to the legitimacy of a child, it is not necessary to prove the actual marriage of the parents; but that a marriage may be proved by evidence of cohabitation, reputation, and the acknowledgment of the parties. The reason for this rule is, that the law favors the presumption of morality in the intercourse between the parents, and consequently, also favors the presumption of the legitimacy of the offspring—*præsumitur pro legitimatione*.

This is a rule of presumptive evidence, and like every similar rule, must depend upon the particular circumstances of the case. Thus it was held in the case of *Cunningham v. Cunningham*, (2 Dow. 482,) that the presumption was impaired by proof that the connection between the parents was illicit in its commencement; and that the repute of marriage must be

Clayton v. Wandell.

general, to raise a presumption in its favor. And in the case of *Jackson v. Clair*, (18 John. 346,) Chief Justice Spencer expresses the opinion that a separation between the parties to a reputed and acknowledged marriage, followed by an actual marriage, would be sufficient to warrant the jury in presuming that the intercourse and cohabitation between the parties to the reputed marriage was meretricious.

Adopting the general rule, with the qualifications laid down in these decisions, it certainly might admit of doubt, whether, if the question before us were as to the legitimacy of a child of the reputed marriage, there would be sufficient evidence to authorize a presumption in favor of such marriage. But, however that might be, it seems to us that the proof as to the first alleged marriage is not sufficient to render an admitted actual marriage illegal and criminal, and bastardize the issue of such marriage. It would not be sufficient to sustain an action for criminal conversation, or an indictment for bigamy. (*Morris v. Miller*, 4 Burr. 2057. *Birt v. Barlow*, Doug. 171. *The People v. Humphrey*, 7 John. 314.) The reason for these decisions is, that proof of actual marriage is necessary to overcome the presumption which the law makes against crime, or acts of a criminal nature. Now if we presume in this case that the reputed marriage actually took place, it necessarily follows that the marriage actually proved was criminal. The presumption which the law makes in the case of a prosecution for bigamy is not so much in favor of the criminal, as it is against the commission of crime. And whether the effect of the presumption is to protect a party against a criminal prosecution, or to protect his offspring against the stain and disabilities of illegitimacy, the principle is equally applicable. Thus it was held in a case of a different character, although illustrative of the principle, that in an action against an insurance company to recover a loss by fire, the jury, in order to sustain the defence that the plaintiff had wilfully set fire to the premises, ought to be satisfied that the act imputed to him, was as fully proved as would justify them in finding him guilty on a criminal charge for the same offence. (*Thurtell v. Beaumont*, 3 Bing. 339.) The

Clayton v. Wardell.

presumption in that case was against the doing of a criminal act, although the party was not on trial for a crime. And according to every rule of sound reasoning, such presumption ought to be invoked equally in favor of any person who makes a claim which can only be defeated by assuming that a crime has been committed. (*See Starr v. Peck*, 1 *Hill*, 270, 272.)

It was contended, upon the argument, on the authority of *Fenton v. Reed*, (4 *John*. 52,) that the only cases in which proof of actual marriage is necessary, are prosecutions for bigamy, and actions for criminal conversation. The opinion expressed by the court in that case was founded on a remark made by Lord Mansfield in *Birt v. Barlow*, above cited. But he never could have intended to say that no other case could arise in which, under any state of circumstances, proof of an actual marriage would be necessary, even if the principle upon which such proof is required, in the cases which he mentioned, would be equally applicable. Those were the only cases which had arisen, in which an exception to the general rule had been made. Here, however, is a new case, wherein the application of the principle upon which those cases were decided is equally necessary; and it must follow that it forms a third exception to the general rule. As there is not sufficient proof that Sarah Maria Youngs was a married woman at the time of her actual marriage with George Messerve, such marriage must be considered legal, and the offspring, so far as the issue before us is concerned, must be regarded as legitimate.

The decree of the surrogate must therefore be reversed with costs.

SAME TERM. *Before the same Justices.*

HALSTEAD *vs.* THE MAYOR, &c. OF THE CITY OF
NEW-YORK.

A draft, or warrant, drawn by the corporation of the city of New-York, upon the treasurer of the city, not in the course of its proper legitimate business, is void in the hands of a bona fide holder, without actual notice of its consideration.

The corporation of the city of New-York has no general power, express or implied, to issue negotiable paper. It has only a special and conditional implied power for that purpose, i. e. it is necessary as a condition precedent to the validity of such paper that the debt which forms its consideration should be contracted in the course of the proper legitimate business of the corporation.

The charter of the city of New-York being a public act, every person who takes the negotiable paper of the corporation is bound to know the extent of its powers; and is presumed to receive it with a full knowledge that such corporation has only a limited and conditional power to issue it. He is thus put upon inquiry, and takes it at his peril. *Per* EDWARDS, J.

As a general rule, the power of the corporation of New-York to institute and defend suits, can only be exercised in cases where the corporation is a party to the suit. But there are some exceptions, in cases where the corporation, though not a nominal party to the record, is the real party in interest. *Per* EDWARDS, J.

THIS was an action of assumpsit, tried at the New-York circuit in March, 1848, before Justice EDWARDS. The plaintiff declared upon two drafts or warrants, one for \$2661,27, dated May 10th, 1847, and one for \$300, dated May 11th, 1847. The first was in the words and figures following:

"New-York, May, 10, 1847. No. 2557. \$2661,27.

To the Treasurer of the city of New-York, at the Bank of the state of New-York. Pay Peter A. Cowdrey, or order, two thousand six hundred and sixty-one dollars, for defendant's costs in the case of R. H. Morris and 8 others, former supervisors.

A. H. MICKLE, Mayor.

D. T. VALENTINE, Clerk. JOHN EWEN, Comptroller."

Endorsed,

P. A. Cowdrey.

J. H. Cowdrey.

Contingencies.
Countersigned.

Halstead v. The Mayor, &c. of New-York.

The second draft or warrant was in the same form, except that it required the payment of \$300 to Peter A. Cowdrey or order, "for counsel fees of the defendants in the matter of R. H. Morris and eight others, former supervisors." It was endorsed by P. A. Cowdrey and O. & N. Wetmore. The signatures of the persons signing the drafts, and their official characters, was duly proved, as well as the signatures of the endorsers. An extract from the ordinance of the corporation entitled "an ordinance concerning the department of finance," passed May 14, 1839, was then read in evidence as follows: "§ 4. It shall be the duty of the comptroller to draw and sign all warrants on the chamberlain for moneys which he shall be duly authorized to draw from the treasury, and present the same to the mayor and clerk of the common council, to be countersigned by them respectively." The protest of the drafts for non-payment, and notice thereof to the defendants, was duly proved. And after proving the amount due for principal, interest and protest, the plaintiff rested. It was then proved on the part of the defendants that the consideration for the drafts was as follows: That some time in or about September, 1841, separate suits were commenced in the name of the people of the state of New-York against Robert H. Morris and 7 others, supervisors of the city and county of New-York, to recover the penalty of \$250 from each of them, for neglecting and refusing to audit and allow the account of James Lynch, one of the associate justices of the court of general sessions of the city of New-York, as required by the fourth section of the act entitled "An act to enable the supervisors of the city and county of New-York to raise money by tax," passed May, 26, 1844. That on the eighth day of May, one thousand eight hundred and forty-seven, a resolution was passed by the common council of the said city, as follows: "Resolved, that the comptroller be and is hereby authorized and directed to pay the amounts of the several judgments against the said supervisors, with the costs to be taxed, incurred by them in the defence of said suits, and their reasonable counsel fees to be audited and allowed by the finance committee of the common council and the counsel

Halstead v. The Mayor, &c. of New-York.

to the corporation." The defendants then rested. The plaintiff hereupon produced in evidence the taxed bills of the costs referred to in the said resolutions, amounting to \$2661,27, and also the certificate of the counsel of the corporation and of the finance committees referred to in the said resolution, whereby the counsel fees referred to in the said resolutions were audited at \$300. The plaintiff also proved that the said warrant for \$2661, 27, was endorsed by the said Peter A. Cowdrey on the day of the date thereof, to Joseph H. Cowdrey, who thereupon advanced to the said Peter A. Cowdrey the full amount of the said warrant, and that the said warrant for \$300 was, on the day of the date thereof, endorsed by him to the said Oliver Wetmore and Augustus Wetmore, who thereupon advanced to the said Peter A. Cowdrey the full amount of the said last mentioned warrant. The plaintiff also proved that subsequently the said Joseph H. Cowdrey and the said O. and A. Wetmore, for value received by them from the said plaintiff, severally endorsed the said warrants to him, the said plaintiff. The plaintiff also proved that while the said several suits against the said supervisors were pending, and before the same were argued in the court for the correction of errors, and on or about the 26th of January, 1846, a preamble and resolution, of which the following is a copy, was passed by the said common council: "Whereas, Robert H. Morris, Elijah F. Purdy, Frederick R. Lee, Edward S. Innis, Moses G. Leonard, David Vandervoort, Abraham Hatfield, Cornelius B. Timpson and Samuel Bradhurst, acted in the conscientious discharge of their duties as supervisors of the city and county of New-York, in refusing to audit and allow the account of James Lynch, for his salary as associate judge of the court of general sessions, alleged to be due by virtue of the act for the organization of the criminal courts of the city of New-York, until such law should have been declared as a constitutional and valid law; and whereas, by the decision of the court for the correction of errors, in the case of Elijah F. Purdy against the people of the state of New-York, the said supervisors have been sustained in their opinion of the unconstitutionality of said law, therefore,

Halstead v. The Mayor, &c. of New-York.

Resolved, that the corporation of the city of New-York will defend the said supervisors in the further prosecution of the suits now pending against them for penalties for alleged violations of their duty, in declining to pay such salary as aforesaid, and do hereby direct the counsel of the corporation to aid in the argument thereof." And that pursuant to such resolution the counsel of the said corporation aided in the argument of the said causes, and the case and points were printed by the printer to the said corporation, and the expense thereof paid by them.

A verdict was thereupon taken for the plaintiff for \$3138,83 damages, and six cents costs, subject to the opinion of the court upon a case.

S. F. Cowdrey, for the plaintiff.

Willis Hall, for the defendants.

By the Court, EDWARDS, J. This action is brought upon two warrants or drafts given by the defendants, and made payable to P. A. Cowdrey or order; one in the sum of \$2661,27, the other in the sum of \$300. The proof shows that the drafts, after having been duly endorsed, were received by the plaintiff, and there is no evidence that he had any other notice of their consideration than that which is given by the instruments themselves. No objection is made either to the form in which they are drawn, or to the manner in which they are signed; but it is contended that the defendants had no authority to give them.

The consideration of the draft for the larger amount consisted of taxable costs, which accrued in separate suits, brought in the name of the people of the state of New-York against eight of the supervisors of the city and county of New-York, to recover a penalty of \$250, from each of them, for refusing to allow the account of one of the associate judges of the court of general sessions of the city and county of New-York, as they were required to do by the fourth section of the "act to enable the supervisors of the city and county of New-York

Halstead v. The Mayor, &c. of New-York.

to raise money by tax," passed May 26th, 1841. (*Laws of 1841, p. 257.*) The consideration of the other draft consisted of counsel fees which had accrued in the defence of the same suits. The suits were commenced in the month of September, 1841; and some years afterwards judgments were recovered against the defendants in each of them. On the 8th of May, 1847, and a few days before the drafts bear date, a resolution was passed by the common council, authorizing and directing the comptroller to pay the amounts of the several judgments, with the taxable costs and reasonable counsel fees. It was under this resolution that the drafts were drawn; and they appear to have been given for all the costs and fees which had accrued in the defence of the several suits.

The first question to be considered is, whether the defendants had the corporate right and authority to give the drafts for such a purpose.

The charter under which the defendants were incorporated gives them no express power in reference to suits, except that of suing and defending suits in their corporate name and capacity. The extent to which they may exercise that power is not expressly stated; but, like every other incorporated body, they must have, by implication, and as a necessary incident to the powers expressly granted to them, the right to institute and defend suits for the purpose of protecting their own property and interests, and also for the purpose of protecting their corporate privileges and franchises. This is a right of self protection which must belong as well to artificial as to natural persons. But, as a general rule, it can only be exercised in cases where the corporation is a party to the suit. There may be cases, however, in which, as a matter of necessity, the defendants can exercise this right where they are not the actual parties to the record; as in defence of titles acquired from them, and which they are bound to defend, or in defence of persons acting by their authority, and in their behalf. The reason why the defendants would have the right to defend a suit in either of the cases last supposed is, that although not the nominal parties, they would be the real parties in interest. In cases, however,

Halstead v. The Mayor, &c. of New-York.

in which the defendants are neither the parties to the record, nor the real parties in interest, their corporate right to institute or defend suits must cease. In the case before us it appears that the costs and fees, for which the drafts in question were given, did not accrue in any suit brought against the defendants, or against any persons who acted under their authority and in their behalf. On the contrary, they accrued in suits against persons who acted on their own individual responsibility. The suits were brought, too, for the purpose of enforcing a claim which the defendants had no interest in resisting, and for which they were not liable. They were, in no respect whatever, the parties in interest. And although a question as to the constitutionality of the law under which the associate judges held their offices, might have arisen incidentally, the case is not altered.

At the time when the suits were commenced, the act under which the associate judges were appointed had been in force for upwards of a year, and they had acted as members of the court of general sessions during the greater part of that time. No proceedings had been instituted by the defendants for the purpose of showing that their corporate franchises had been abridged or impaired by the appointment of such judges. The constitutionality of the law under which they held their offices had thus been tacitly acquiesced in, and it does not appear that the defendants, in this respect, considered it any infringement of their corporate rights and privileges. If the supervisors chose to assume a different ground, and to disobey the law which required them to allow the accounts of the associate judges, they did so at their own peril, and they should bear the consequences. The act complained of, was done on their own responsibility, and the penalty for their misconduct is entirely personal.

But it was contended on the argument, that even if it should be held that the defendants had no right to give their drafts, for the consideration for which these were given, yet, that the plaintiff is entitled to recover as a *bona fide* holder without notice. It is not denied on the part of the defendants that the

Halstead v. The Mayor, &c. of New-York.

drafts in question are, in their legal effect, negotiable bills of exchange, and that the plaintiff is a bona fide holder, with no other notice of their consideration than that which appears upon the face of the drafts; but it is contended that if they were given without corporate authority on the part of the defendants, they are void, even in the hands of a *bona fide* holder without notice.

It will be remembered that the defendants have no express power given to them by their charter to issue negotiable paper. It has, however, long been a settled doctrine in this state, that a corporation without any express power in its charter for that purpose, may make a negotiable promissory note or bill of exchange, when not prohibited by law from doing so; provided such note or bill is given for a debt contracted in the course of its proper legitimate business. (*Mott v. Hicks*, 1 Cowen, 113. *Barker v. Merchants' Fire Insurance Co.* 3 Wend. 94. *Attorney General v. Life and Fire Insurance Co.* 9 Paige, 477. *Moss v. Oakley*, 2 Hill, 675. *Kelly v. Mayor, &c. of Brooklyn*, 4 id. 263.) But, as far as we are aware, the question has never been decided whether a note or bill issued by such a corporation, not in the course of its proper legitimate business, is valid in the hands of a bona fide holder without notice. In the case of the *Attorney Gen. v. Life and Fire Ins. Co.* (9 Paige, 477,) in which the question arose, the chancellor declined to express any opinion, and placed his decision upon other grounds.

It was contended, on the argument, that the rule of the law merchant, which protects the bona fide holder of negotiable paper, without notice, was of universal application; and that, if the defendants had a right to issue negotiable paper, such paper must, *ex necessitate*, be subject to the same rules as the negotiable paper of an individual. This view seems plausible; but will it bear the test of examination? In the first place, the defendants have no general power, either express or implied, to issue negotiable paper. They have only a special and conditional implied power for that purpose; that is, it is necessary as a condition precedent to the validity of such paper that the debt which forms its consideration should be contracted in the

Cruger v. Cruger.

course of the proper legitimate business of the defendants. The act under which they were incorporated is declared to be a public act. Every person who takes their negotiable paper is bound to know the extent of their powers, and is presumed to receive it with a full knowledge that they have only a limited and conditional power to issue it. He is thus put on his inquiry, and takes it at his peril.

The circumstances, under which a bona fide holder without notice receives the negotiable paper of a natural person, or of a corporation having the general express power to issue negotiable paper, are very different. In both these instances the power to issue such paper is general and unconditional; and hence the rules which have been established by commercial policy, for the purpose of giving currency to mercantile paper, are applicable.

It results from the views which have been expressed, that the drafts in question, not having been issued by the defendants in their proper and legitimate business, are void in the hands of the plaintiff, although received by him without actual notice of their consideration.

Judgment must be entered for the defendants.

SAME TERM. *Strong, Hurlbut, and Edwards*, Justices.

HENRY D. CRUGER vs. HARRIET D. CRUGER, GEORGE DOUGLASS and WILLIAM DOUGLASS.

HARRIET D. CRUGER, by William Douglass, her next friend,
vs. HENRY D. CRUGER.

A husband, by a post-nuptial settlement, made on the 29th of June, 1833, reciting that he had, by means of his marriage, acquired certain interests and rights in his wife's property, released and conveyed all the estate, both real and personal, and all his right, title and interest in such property to trustees, in trust to hold and keep both the principal and interest thereof during marriage,

Cruger v. Cruger.

exempt from his debts, contracts, or control, to be managed and disposed of on his wife's separate orders or receipts, or by her deeds or will, so that she might enjoy and dispose of the same in all respects as if she were unmarried. *Held* that by this conveyance the husband's right to the personal estate, and the possession and the income of the real estate, passed to the trustees. That the husband could not convey, in that manner, the right to dispose of the fee in the real estate at any time, nor of the rents and profits after his decease; and that those rights were unaffected by the deed of settlement, and remained the same as if no such instrument had been made.

Held also, that the wife's interest in her personal property was neither "future nor contingent." That she had the absolute right of disposal of both principal and interest; and that there being nothing in the deed of settlement providing for the accumulation of the income, or suspending the absolute ownership beyond the period of two lives in being, it did not militate against any provision of the revised statutes, and was valid by the rules of the common law.

Held further, that the absolute right of disposal, as to such personal property, gave to the wife the power to convey the principal, or the income only, or any part of either.

And the wife having, in pursuance of the power of appointment contained in such deed of settlement, by deed dated November 19, 1841, conveyed to her husband, for life, the one equal half part of the net income of her separate fortune and estate, both real and personal; *Held* that such deed did not confer upon the husband any right to receive any part of the future rents and profits of her real estate; but that so far as such deed related to the income of the personal estate, it was authorized by the terms of the post-nuptial settlement.

Held also, that such deed from the wife to her husband was not a conveyance of the half of two distinct subjects, but that it conveyed the half of the whole income, as one subject matter; and that if the wife had power to convey so much of her income, from whatever source derived, the instrument would operate upon that part of it; especially as that construction would the best effectuate the intention of the parties, at the time when the transaction took place. And that such deed, if free from other objections, must be adjudged to convey to the husband the income arising from the personal estate, to the extent of one half of the net income of her whole estate, real and personal.

A feme covert, having a separate estate, subject to her own disposal, may give it to her husband, as well as to any other person, if her disposition of it be *free*, and not the result of flattery, or force, or improper treatment.

It is not wrong for the husband to endeavor, by his own reasoning, and the persuasion of his wife's friends, to prevail upon her to make a reasonable disposition of a part of the income of her separate estate, for his benefit.

It is not necessary that the act of the wife should be spontaneous, or that she should adopt the instrument executed by her, through the unaided impulses of her own mind.

Although a wife, in making a disposition of a part of her income for the benefit of her husband, acts in opposition to sentiments which she has long cherished,

Cruger v. Cruger.

yet such disposition will be free, within the principle, if she eventually executes the deed through the deliberate convictions of her own mind ; whether produced by her own reflections, or the suggestions and advice of her friends.

Where a deed, executed by a married woman in favor of her husband, was reasonable in its terms ; was the result of an arrangement made through the advice of the wife's nearest relatives and friends ; was drawn by her counsel ; was executed in pursuance of what appeared to be her convictions of right, at the time ; and was acknowledged by her to be her free act and deed, done without any fear or compulsion of her husband ; and there was no fraud or imposition practiced upon her, the court refused to set the same aside, upon a bill filed by her for that purpose.

Upon every sound principle of construction a reference to a term used in a statute must be in its direct and primary sense as expressly defined, and not in an assimilated interpretation. And this rule is more especially applicable when the express meaning will accomplish all that was designed by the framers of the law. *Per STRONG, P. J.*

IN EQUITY. These causes came before this court on appeal from a decree of the late vice chancellor of the first circuit, made upon an original and a cross-bill. The original bill was filed by Mr. Cruger against his wife, and her two brothers, the trustees of her estate, for the purpose of setting aside a deed of settlement executed by Mr. Cruger on the 29th of June, 1833, immediately after the solemnization of the marriage between him and his wife, which purported to convey to the trustees all her estate, real and personal, in trust for her use, and subject to her appointment and disposal. Or, in case it should be decided that the property was held by the trustees under a valid subsisting trust, then that the plaintiff might have the benefit of a deed of appointment executed by Mrs. Cruger, on the 19th of November, 1841, which purported to give to him one half of the net income of her estate, during his natural life. The bill prayed that the deed of settlement might be decreed to be null and void, and insufficient to bar the husband's marital rights in the personal estate of his wife, or in the rents and profits of her real estate ; that the trustees might be enjoined from further meddling or interfering with the property ; that they might be decreed to account to the plaintiff for all dividends, rents, interest money, &c. received, expended or reinvested by them while acting as trustees, and to pay over to the plaintiff whatever

Cruger v. Cruger.

should be found due to him, upon such accounting, and to deliver up to him all books, papers, securities, &c. relating to the estate; that they might also be decreed to let the plaintiff into the possession, use, and enjoyment of the real estate, and to assign and convey such parts thereof as stood in their names as trustees, to Mrs. Cruger, to the end that the plaintiff might have his rights over the same as her husband. But that in case the trustees, in the opinion of the court, had full power and authority under the deed of settlement, to act as such trustees, that they might be directed and required forthwith to proceed to demand and recover from George Douglass, one of the defendants, the property in his hands belonging to Mrs. Cruger, and to collect in the same and invest it so as to be productive; that they might be required to convert all of the principal of the estate into productive property, and to manage the same so as to yield the most income; that they might be ordered to collect in, and pay over to the plaintiff, such arrearages of the income as might be outstanding; that a receiver of the estate might be appointed, and that the trustees might be directed to transfer and deliver to him, upon oath, all the property and effects belonging to the estate, and all books and papers relating thereto; that the trustees might be enjoined from meddling with the estate, or the income thereof, and that they might be removed from the trust, and other trustees be appointed in their stead. The deed of settlement which was sought to be set aside by this bill was as follows:

“A marriage having been solemnized between Henry N. Cruger, junior, and Harriet Douglass, by means whereof he has acquired at law certain interests and rights in her property, the said Henry N. Cruger, junior, hereby freely, fully, and unreservedly releases and conveys all the estate, both real and personal, heretofore owned by her, or which she may hereafter acquire, and all his right, title, and interest therein, to George Douglass, William Douglass, James Monroe, and Robert Halliday, and to such substitutes as she may from time to time appoint, jointly and severally in trust to hold and keep both the principal and interest thereof during the said marriage, exempt

Cruger v. Cruger.

from his debts, contracts, or control, to be managed and disposed of on her separate orders or receipts, or by her deeds or will, so that she may enjoy and dispose of the same, as it came from her parents and sister, or may hereafter in any manner accrue to her, in all respects as if she were unmarried. In witness whereof, the said Henry N. Cruger, junior, has hereunto set his hand and seal, at the city of New-York, this twenty-ninth day of June, in the year of our Lord one thousand eight hundred and thirty-three.

H. N. CRUGER, Jr." [L. s.]

It appeared that at some time between the date of this deed and February, 1835, Mr. Cruger altered his name from "Henry N. Cruger, jun." to "Henry D. Cruger." Previous to the commencement of these suits, Robert Halliday, one of the trustees named in this deed, had died, and Mr. Monroe had resigned his trust. Soon after the marriage, Mrs. Cruger signed and delivered the following order, in duplicate, one to the trustees, and the other to the plaintiff:

"Bloomingdale, 15 July, 1833.

To Robert Halliday, Esq.

As acting trustee and agent of my property, you are hereby authorized and requested to pay to Mr. Cruger, upon his written order or receipt, the income of my estate as it accrues. Signed with all the heart of

HARRIET CRUGER."

Several other appointments, gifts, or conveyances were made by Mrs. Cruger in favor of her husband, between the time of the execution of the deed of settlement and the 19th of Nov. 1841, which it is not necessary to mention here, as they are referred to in the opinion of the vice chancellor. The deed of appointment executed by Mrs. Cruger on the 19th of November, 1841, which was sought to be established in this suit, was in the following words:

"Know all men by these presents, that I, Harriet D. Cruger, the wife of Henry D. Cruger, Esquire, by virtue and in pursu-

Cruger v. Cruger.

ance of the power and authority in that behalf contained in my post-nuptial settlement with him, and by virtue and in pursuance of every other power and authority enabling me so to do, and for divers good and sufficient causes and considerations me thereunto moving, have irrevocably assigned, transferred, limited, and appropriated, and in and by these presents, I do irrevocably assign, transfer, limit and appoint to my said husband, for and during the rest, residue, and remainder of his natural life, the one equal half part of the net income of all and singular my separate fortune and estate, both real and personal, commencing on the first day of November instant, inclusive, which provision hereby made for him by me is not to be construed as impairing, or in any way affecting, any provision which I have made, or which at any time or times hereafter I may make for him, in and by my last will and testament, or other instrument of appointment, in the nature thereof. But the provision hereby made is to be accepted by him, and is intended by me, in lieu of the provision of an annuity of three thousand dollars which I made for him in and by a certain instrument, executed under my hand and seal the seventh day of September, in the year one thousand eight hundred and forty. And I do hereby fully authorize and direct my trustees, under the said settlement, or the agent for the time being of my estate, to pay to the said Henry D. Cruger the said equal half part or moiety of the net income of my said fortune and estate during the residue of his natural life. And I do hereby assume upon myself the collection of all debts, dues, and demands due or belonging to me or my estate. And I do hereby fully acquit, exonerate, and discharge the said Henry D. Cruger, his heirs, executors, and administrators, of and from all debts, dues, claims and demands, now due or owing by him to me, or my said trustees, or estate, and all further or future responsibility or liability touching the same, or any part or parts thereof. In witness whereof I have to these presents set my hand and seal, this nineteenth day of November, in the year of our Lord one thousand eight hundred and forty-one.

HARRIET DOUGLASS CRUGER." [L. s.]

Cruger v. Cruger.

This deed was acknowledged by the grantor before a commissioner, in the form required by law as to deeds by married women, on the day after its date.

The cross-bill was filed by Mrs. Cruger against her husband, for the purpose of establishing the deed of settlement executed by him upon the marriage of the parties, by virtue of which she claimed that the whole of her estate, both real and personal, became vested in the trustees, in trust for her, and subject to her appointment and disposal as if she were unmarried; to be held and kept by them during the marriage, entirely exempt from her husband's control. The bill also sought to annul and have declared void all appointments and settlements of the income which she had made, upon or in favor of her husband, and especially the last act or deed of the kind, the above mentioned deed of the 19th of November, 1841, under the circumstances, and for the reasons stated in the cross-bill, and in the opinion of the vice chancellor. Answers were put in, by the defendants, in each suit, and replications were filed and proofs taken, and the causes were heard together. On the 17th of December, 1845, the vice chancellor made a decree in both suits, declaring the deed executed by Mr. Cruger on the 29th of June, 1833, to be valid and effectual as a marriage settlement; that the verbal gift alleged to have been made by Mrs. Cruger to her husband on the day of their marriage was only intended as a revocable nuncupative will, and was void and inoperative for any purpose; that the order in writing subscribed by Mrs. Cruger, dated July 15, 1833, on the then acting trustee of her estate to pay the income to her husband as it should accrue, was not an appointment or authority vesting in him the said income, but was merely an authority to the acting trustee to pay over such income to Mr. Cruger as an agent in that behalf, for disbursement, according to the trusts of the marriage settlement, and was revocable at the will and pleasure of Mrs. Cruger; that the several alleged appointments, gifts, or conveyances of property or income to or for the use of Mr. Cruger, respectively bearing date June 29, 1835, July 27, 1836, November 27, 1836, November 30, 1836, October 26, 1839, November

Cruger v. Cruger.

2, 1839, May 13, 1840, and September 7, 1840, had become and were inoperative and of no force or effect, and that the same, and each, and every of them ought not to be executed or enforced by the court; that the deed of the 19th of November, 1841, executed by Mrs. Cruger, was a good and valid appointment under the power contained in the deed of settlement; and that Mr. Cruger was entitled, under the same, to the one-half of the net income of the estate of Mrs. Cruger, for his life, irrevocably by her. It was further declared, what portions of her estate were embraced in that deed and within its operation; and it was declared, adjudged and decreed that Mr. Cruger was entitled to an account of one-half of the net income of the real and personal estate of his wife, except of those parts declared not to be embraced in the deed; and a reference to a master to take such account was ordered. The decree directed that in taking such account, Mr. Cruger should be charged with whatever moneys, if any, he had received for principal and interest of the several loans to his brother; that the trustees should, out of the income of the estate, pay to Mr. Cruger, forthwith, \$2500, and that from and after the 1st of November, 1845, they should account with and pay over to him from time to time, semi-annually during the rest of his life, one-half of the said net income of the estate, real and personal, so adjudged and decreed to him, as the same should accrue and be collected by them. And the question of costs, and all further questions and directions, were reserved until the coming in of the master's report.

Mrs. Cruger, and the trustees of her estate, appealed from so much of this decree as declared the deed of the 19th of November, 1841, a good and valid appointment under the power contained in the deed of settlement; from all and every part thereof subsequent to the provision respecting that deed; and from the whole of the decree except what precedes that provision. And Mrs. Cruger, by William Douglass her next friend, as complainant in the cross-bill, appealed from the same parts of the decree.

The facts in the case, as they appeared from the pleadings

Cruger v. Cruger.

and proofs, are very fully stated in the annexed opinion of the vice chancellor.

W. T. McCoun, V. C. The bill in the original cause is filed by Mr. Cruger against his wife, and her two brothers, who claim to be trustees of her estate, for the purpose, in one aspect, of ridding the estate of the trust, in order that there may be no obstacle in the way of his asserting the common law rights of a husband to the property of his wife; or in case it shall turn out that there is a valid subsisting trust under which the property is held, then that he may have the benefit of a deed of appointment executed by her under the date of the 19th of November, 1841, purporting to give him one-half of the net income of the whole estate, real and personal, during his natural life: and the bill calls upon the two brothers of his wife, either to yield the possession of the property to him, to be managed as a husband is entitled by law to manage, possess and enjoy the property of his wife; or else in their capacity of trustees, to perform their duty in respect to the making of investments, the collection of rents and income, the paying of dividends, and the rendering of proper accounts; or that they may be removed from the trust, and other trustees be appointed in their stead.

On the other side, the cross-bill filed by Mrs. Cruger against her husband, has for its object, first, the establishment, by decree of this court, of a deed of settlement executed by him immediately after the solemnization of their marriage, on the 29th of June, 1833, by which she claims that the whole estate, both real and personal, became and was vested in trustees for her use, and subject to her appointment and disposal as if she were unmarried, and to be held and kept during the marriage entirely exempt from his control; and secondly, it seeks to annul and have declared void all appointments and settlements of the income which she at any time may have made upon or in favor of her husband, and especially the last act or deed of the kind, executed by her under date of the 19th of November, 1841 before mentioned.

This presents a very general view of the nature and object
VOL. V.

Cruger v. Cruger.

of the suit on both sides ; and it will be readily perceived that this court can deal with the controversy, only so far as property is concerned. Over the conduct and acts of the parties, except with reference to their respective rights of property, and for the purpose of enforcing those rights when ascertained, this court can exercise no control. It has not jurisdiction to compel cohabitation, where one party withdraws from the society of the other without justifiable cause, nor to decree a restitution of conjugal rights withheld. Whether the decision I am about to make, will have a tendency to produce such desirable results from any moral force or influence it may carry with it, I cannot undertake to predict ; but I will indulge the hope that the questions which have so long agitated the minds of the parties in relation to the property, being once settled, by a definitive sentence or decree upon just and equitable principles, there will be nothing left to disturb the peace and harmony that always should subsist between intelligent, upright and virtuous minds, and that they will see the importance of returning to those duties which the domestic relation requires, and which, as enlightened members of a moral and christian community is demanded of them.

The first question to be considered is, upon the validity and effect of the husband's deed of the 29th of June 1833, as constituting a post-nuptial settlement of the property upon the wife. The whole of the property belonged to her before the marriage, and the absence of any thing in the shape of a marriage settlement would leave him to enjoy the legal rights of a husband over her property which could not be disputed.

Much, therefore, depends upon this instrument ; for if it cannot be sustained of itself, or as an evidence of an ante-nuptial agreement, which the court is bound to carry into effect, then all the court has to do is to pronounce it a nullity, and leave the husband in the possession of the rights conferred upon him by the marriage. In the first place, the instrument is alleged to be void upon its face, for the reason that there is no consideration expressed.

The statute relative to fraudulent conveyances, (2 R. S.

Cramer v. Cramer.

134, 135,) does indeed require that certain contracts or agreements, in order to be binding, must be in writing, and must *express the consideration*, and must be subscribed by the party, or his agent; but this provision of the statute has reference to *executory* contracts or agreements, such as rest in covenant or promise to do or perform some act in future, and does not apply to contracts *executed* by the act or deed itself. This is manifest from another section of the same statute: "No estate or interest in lands, (other than leases for a year,) nor any *trust* or *power* over or concerning lands, or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a *deed* or *conveyance in writing*, subscribed by the party creating, granting, assigning, surrendering or declaring the same," &c. Here no mention is made of a consideration *expressed*. In an instrument, therefore, which of itself creates and passes the estate, title or interest, by words of grant, assignment, surrender or declaration of trust, it is not necessary that it should express the consideration on which it is founded. A consideration is *implied* from the fact of the party's signing and sealing the instrument; and this is sufficient to support it as a deed, until it is impeached or invalidated for some other cause. Now the deed in question is not in terms *executory* or *promissory*. It is not a covenant or agreement to do something in future, but it is an act or deed by which all that was ever contemplated is done and accomplished at once. It speaks in the *present*, not in the *future* tense. It purports to divest the husband of all his interest and right in his wife's property which he had acquired at law by the marriage, and to vest it in trustees for her separate use. The language of the deed is, that he thereby freely, fully and unreservedly releases and conveys all the estate both real and personal of the wife, which she then owned or might afterwards acquire, and all his right, title and interest therein, &c. It is therefore an *executed*, not an *executory* instrument, and does not belong to that class of written instruments which are declared void by the statute of frauds, for not expressing the consideration.

Cruger v. Cruger.

The next objection taken to this instrument is, that if not void for want of an express consideration, still that it is void by the statute of *uses and trusts*, as containing a trust not sanctioned by that statute. (1 R. S. 727, § 55.) The trust as declared is that the trustees are "to hold and keep both the principal and interest thereof (that is, of the whole estate,) during the said marriage, exempt from his (the husband's) debts, contracts, or control; to be managed and disposed of on her separate orders or receipts, or by her deeds or will, so that she may enjoy and dispose of the same, as it came from her parents and sister, or may hereafter in any manner accrue to her, in all respects as if she were unmarried." In the matter of *time* or *duration* the trust is not objectionable; for it is to continue only during the marriage of the parties, and by no possibility can this extend beyond the life of the wife. The objection, however, rests upon a more formidable ground, viz: that by the terms of the deed the trustees are not required to perform any active duties in the management of the estate, or in the receipt of the rents and profits, and the application of them to the use of the wife, but the wife herself, instead of being a mere recipient or passive party, is constituted the active party in the *trust*, to manage the property in all respects as the legal owner. That such a mere *nominal trust* is contrary to the policy of the law, and the spirit and intention of the statute, is not now to be questioned. The final decision in the case of the Lorillard will, and in other cases subsequently, has settled that point. The question is whether the trust here created, or intended so to be, is of that character. It must be admitted that the deed is informal, and the trust inartificially expressed; but it does not follow that it will be disregarded on that account, as entirely ineffectual. This court looks at the substance rather than at the form of things, and endeavors to ascertain the object and design of every deed or instrument brought before it. If the words used admit of different meanings, by one of which the instrument may be good, and by another void, the duty of the court is to attach to them the meaning that will uphold, rather than the one which will overthrow

Cruzer v. Cruzer.

the deed. The words of strongest import against the validity of the trust in question, are these: "To be managed or disposed of on her separate orders or receipts, or by her deeds or will, so that she enjoy the same in all respects as if she were unmarried," carrying with them the appearance of an intention to place the whole property in her possession, and to leave it to her management as well as at her ultimate disposal, as though she were a *feme sole*, and as though trustees were but nominal parties in the deed, and had no duties to perform: but when these words are read in connection, as they must be, with those that precede them, a different sense is conveyed. The words that precede are words of release and conveyance to third persons by name. They are sufficient to pass whatever legal interests or rights of property the husband had acquired in the estate of his wife by the marriage, and the trustees became vested with those rights by the delivery and acceptance of the deed. (11 *Wend.* 247, 248.) From that moment their duty as trustees commenced. It was an active trust they were called upon to execute—a trust in the first place "to hold and keep both principal and interest of the whole estate during the marriage exempt from the husband's debts, contracts, or control." How could they hold and keep, and protect the property, and especially the income, from the husband, and against his creditors, without taking it into their own hands and under their control? To leave it in the possession of the wife and under her management would be to leave it still in the husband's possession and under his control. Her possession would in legal contemplation be his possession, and the declared object of the deed might therefore be defeated. It must not be supposed that the parties intended such a result. On the contrary it was as necessary to vest the trustees with the actual possession as with the legal title; and both being united in them, the active management of the estate at once devolved on the trustees, one of whom (Mr. Halliday,) immediately entered upon the duties of the trust, and did in fact take charge of and manage the estate. So far therefore as respects the commencement of the trust clause in the deed, viz: "to hold

Cruger v. Cruger.

and keep the property," &c. for the purpose of protecting it against the acts of the husband himself, it appears to be free from the objection that no active duties on the part of the trustees were required.

Do the words, then, which immediately follow, "to be managed and disposed of on her separate orders or receipts," &c. take from it that character? In my opinion they do not. It is very evident they were not intended to relieve the trustees of their duties, and to convert them into mere automata, or nominal parties to the trust. No such meaning ought to be given to the words, and the whole, taken together, ought not to bear that construction. A more consistent and rational understanding of them is, that they were meant to designate the wife as the sole beneficiary of the trust—to point out very generally the manner by which she might receive and enjoy the benefit of the property free from his control, viz: by orders on the trustees, and receipts to them in her own name, and by ultimately disposing of the estate as she might see fit. The latter is in the nature of a power of appointment, to be exercised by deed or by will. Still the question is not wholly disposed of; for although one objection is removed, another remains. The trust as declared is not in the words of the statute, "to receive the rents and profits, and apply them to the use of the wife." It has been held repeatedly not to be essential to the validity of the trust that it should be expressed in the very words of the statute. A deviation in the phraseology will not vitiate, provided the object of the statute is substantially complied with, (*see Gott v. Cook*, 7 *Paige*, 538, 539;) and here I think there is a substantial compliance with the statute. It follows, from the nature of the trust, that the trustees must receive the rents and profits. This, as already shown, is a part of the active duty belonging to the trustees, to hold and keep both the principal and interest exempt from the husband's debts, contracts, or control, and when the money is paid over upon the wife's separate orders or receipts, it is applied to her use within the meaning of the statute. (*Gott v. Cook*, *supra*.)

Cruger v. Cruger.

I have thus far considered the question upon the law of trusts, in relation to *real* estate ; the statute of uses and trusts having reference solely to that species of property. But with regard to the personal property embraced by the same deed of settlement, it will be perceived that the trust is equally free from any well founded objection. We have no statute declaring how, or for what purposes personal property shall or may be placed in *trust*, nor imposing any restriction upon trusts of *personalty*, except *trusts of accumulation* for the benefit of minors, which are to be limited to their respective minorities, and all beyond that period are made void. There is a statute also against *suspending* the *absolute ownership* of personal property beyond the period of *two lives in being*, and by which, moreover, *limitations* of future and contingent interests in personal property are subjected to the same rules as prescribed by another statute in relation to future estates in lands ; but none of these statutory provisions touch the deed in question. There is here no trust for the purpose of accumulation—nothing that operates as an *undue* suspension of the absolute ownership of property ; and no violation of the rules of law in regard to future or contingent estate.

If I am correct in holding this to be a valid deed of settlement upon its face, and the *trust* such as upon a fair construction the law has not prohibited, then it becomes unnecessary to determine whether there was or was not, an *agreement*, ante-nuptial, on which it was founded. The parties are at issue on that point. The wife claims for the deed that it was executed in pursuance of a previous agreement or understanding, which formed a condition on which she entered into the marriage compact ; and that however informal or defective the instrument might prove to be, there being ample consideration in the fact of a previous agreement, this court will reform the deed if necessary, and sustain and establish it as a valid settlement upon her. On the other hand the husband denies that any previous agreement existed for a settlement, as a condition of the marriage or otherwise ; and he asserts that the deed as executed and delivered, was a voluntary offering on his part.

Cruger v. Cruger.

The proofs in the cause do not furnish direct and positive evidence of a previous agreement, by which the property was to be settled upon the wife after the marriage. In all probability it was a point about which they had not specifically agreed, although a wife's right to retain the control and exclusive ownership of her estate after marriage, had been often, and for a long time, a subject of discussion between them. She had been taught to believe in the superiority of the wife's right in that respect over the *marital* right which the common law confers upon the husband ; and she appears to have adopted it as a fixed principle in relation to her property, never to surrender the control and ownership of it to a husband, any further than to allow him to enjoy the income with herself, and to be a disbursing agent of it, for their mutual benefit. To this, as a principle of her life, she has clung ever since the marriage, even at the sacrifice of her domestic peace and happiness. Still I believe the marriage took place without having that point conceded to her ; but as I have no doubt, under the fullest persuasion in her own mind, that her husband, understanding as he did her sentiments upon the subject, would fulfil that expectation, and relinquish the right which the law would give him over her property ; and that knowing her wishes, and actuated by a desire to gratify them, he prepared the instrument beforehand, and upon the solemnization of the marriage, promptly and generously executed it, divesting himself of all right of property in her estate, which he had but that instant acquired. This view of the circumstances which led to the making of the deed, and under which it was executed and placed in the hands of the trustees, tends to the removal of all conflict in the statements of the parties concerning it.

The next question then is, upon the character of the order of Mrs. Cruger upon Halliday, the acting trustee and agent of the estate, under date of the 15th July, 1833, by which he was authorized to pay to Mr. Cruger the *income* of the estate as it should accrue. Was this a mere authority for him to receive the income as being still the money of the wife, or is it to be regarded as an *appointment* under the deed of settlement, irre-

Cruger v. Cruger.

vocable in its nature, and by which the income of the estate was given back to the husband as his own? He claims for it the character of a *gift* to him of the *whole income*, made in fulfilment of a verbal declaration of hers to that effect, on the evening of the marriage, in consideration of his having executed the deed of settlement. Her answer, called for upon oath, and responsive upon this point, denies that such was the origin and object of this order. She says that, feeling gratified by his conduct in executing the deed, and having previously intended to allow him to enjoy the income of her property, in case he should survive her, she called upon some of the persons present on the occasion of their marriage, to witness her declaration that if she should die before having an opportunity to make a will, it was her will that her husband should enjoy the income of her property during his life. And she positively denies that she made, or intended to make, by that act or declaration, any other gift or disposition in favor of her husband than by a verbal or nuncupative will, to take effect at her death, in case he should survive her.

That the purport and design of her declaration, so made, was *testamentary*, was placed beyond all doubt by the concurring testimony of the Rev. Dr. Phillips, the Rev. Dr. Wainwright, and Mr. Monroe. They prove that it was expressed as her "*will*," to take effect in the event of her death suddenly occurring before one in writing could be prepared. Her husband had just parted with all his interest in her property, and she wished to guard against a contingency, by which he might be deprived of all benefit from the income of the estate which she intended he should have during his life, in the event of his surviving her. Such a disposition of the net income would, of course, take effect only at her death; a thing very different from a gift, or an intended gift, to take effect or become absolute in her lifetime. She denies, moreover, in her answer, that the proposed nuncupative will had any connection with the subsequent giving of the order of the 15th of July, or that the latter was in confirmation and fulfilment of the alleged gift of the income made by the former, or intended thereby. I am bound to believe her

Cruger v. Cruger.

statement in this particular, because it is responsive to a direct allegation of the bill, and the denial is not disproved by any evidence in the cause.

The answer likewise explains the circumstances under which the order was made, and states her reasons and motives for it; all of which are perfectly in keeping with the idea of its being a mere matter of business arrangement between herself and husband, and not a gift of the income to him. She appears to have been made aware of the embarrassment that might arise from her undertaking to make deposits in bank on her separate account, and to draw checks in her own name; and deeming it to be (as she very properly might) the more appropriate duty and business of her husband to look after her income, and to attend to the disbursing of it in their personal and family expenses, and being anxious at the same time to save his feelings from all seeming distrust, and to show how unbounded was her confidence in him, she subscribed the order in the very significant and feeling manner expressed upon its face.

Some effort has been made to support the husband's claim under the order, as a purchase of the income, founded on the consideration of his relinquishing a lucrative profession on entering into the marriage; and on the other hand numerous facts and circumstances have been adduced in argument to prove that no such idea could have existed at the time, nor for a long time afterwards, even in the mind of the husband himself; and that his letters on various occasions, and his acts and proceedings during a series of years, are opposed to any such construction being given to the transaction. There is much force in the argument drawn from these sources, but it is unnecessary to dwell upon them here. An attentive consideration of all the circumstances has satisfied me that the order of the 15th of July, 1833, was not given as an *irrevocable appointment* of the income to the husband, in effect restoring to him his marital right in the property, and that such is not the true character, and was not the intention of it.

Thus far, then, we find that by the husband's deed of settlement the whole property, capital and income, was secured to

Cruger v. Cruger.

the wife, and by her order a stewardship was created in the husband, over the income, which involved in itself the duty of keeping accounts. This duty, in fact, he undertook to perform; but it appears soon to have become irksome to him. At the second anniversary of their marriage, the discovery was made that the sums drawn from the trustees, and expended, had exceeded the income. This circumstance, and the trouble of keeping minute accounts, led to dissatisfaction, and produced some difficulty. It was a cardinal rule with Mrs. Cruger not to allow the capital of her estate to be encroached upon, or diminished; and although the husband, immediately upon its being discovered, made good the deficiency out of his own resources, it showed the necessity of more economy, and a closer attention to the keeping of accounts. The latter duty had a tendency rather to increase than to remove the cause of his discontent. This is shown by his handing back to her the order, with liberty to her to revoke it if she pleased. She, however, did not revoke it, but addressed to him a note, under date of 29th of June, 1835, by which she proposed to relieve him, in some measure, from the trouble of keeping minute or detailed accounts, and to allow him to retain a specified part of the income, for his own sole use, and without any accountability to her for it.

The terms thus proposed, she offered to confirm by orders or directions to her trustees. All this was done, as she says—and she speaks responsively—not for the purpose of creating an irrevocability about her former order, but to lessen his dissatisfaction, and to silence his murmurings about keeping full and particular accounts, and to render the manner of receiving and disbursing her income more agreeable to him. I do not see, therefore, that the rights of the parties, as they existed previously, were materially changed by this act of hers of the 29th of June, 1835.

The original order, which he offered to surrender, appears to have found its way back into his hands, and all things went on harmoniously between them until another year had elapsed. At this time (towards the last of July, 1836,) fresh difficulties

Cruger v. Cruger.

arose. For causes either real or imaginary, which she has set out in her answer, she withdrew the agency of the estate from Mr. Halliday, the acting trustee, and took from him the duplicate of the order of the 15th of July, 1833, which had been deposited with him, and appointed Mr. Brown agent of the estate, in the place of Halliday; and this change was made without previously notifying her husband of what she was about to do. Of course it was a surprise upon him, and he became greatly excited by it; so much so that he left their residence, and took lodgings elsewhere. Then, for the first time, the question seems to have come under discussion between them, whether the order she had recalled was revocable or irrevocable; and it resulted, after a few days' separation, in his writing a note addressed to Mr. Halliday and Mr. Monroe, as trustees of the estate, dated 8th of August, 1836, in which he says that under Mrs. Cruger's assurance that she did not intend the order for the payment of the income to him to be irrevocable, he of course had not the right to have it so considered. This removed at once all cause for his separating from her, and he accordingly returned; having determined to meet her, as expressed in a letter to her at the time, upon her own terms, viz. to "trust in her confidence, affection, honor and generosity." After this reconciliation the parties spent a part of the autumn of that year (1836,) together at Henderson, their country residence, in Herkimer county, from whence they returned to the city some time in November.

The subject of Mr. Cruger's dependant condition was now again renewed as a matter of discussion between them, attended by importunity and a course of conduct towards Mrs. Cruger (of which she complains,) in order to induce her to make some settlement of income upon him, by which he might be relieved from the state of dependance and uncertainty in which he was placed. With a view to some arrangement to that effect, the friendly offices of Mr. Bard, and Captain Whetten, were accepted as arbiters, and their opinions and advice as to the basis of a settlement, dividing the income, were given, but without effect. Nothing came of it, or of certain papers which

Cruger v. Cruger.

he caused to be prepared, about the same time, and requested her to unite with him in executing, but which she refused to execute. Comparative peace and quietude, nevertheless, appears to have been restored to the minds of the parties at that period, by a solemn declaration which Mrs. Cruger made in writing, addressed to her sister Mrs. Monroe, under date of November 30, 1836. This paper embraced the most important points in the controversy between them. Mrs. Monroe gave it her sanction and approval, Dec. 20, 1836, in these words: "I truly believe my sister in the declarations made in this letter, and that she will strictly adhere to them throughout her life." Captain Whetten also expressed, in writing, his entire confidence in them.

From this time until the autumn of 1839, a period of about three years, the parties appear to have lived happily together, nothing having occurred to disturb the harmony between them. A portion of the years 1838 and 1839 they spent in Europe. On their return they went to Henderson, and passed the summer of 1839 at that place. In the autumn, on coming to town, a difficulty again arose about the income, in consequence of the dishonor of a draft which Mr. Cruger had drawn on Brown, the agent, for money to pay debts or expenses incurred at Henderson; she having given some instructions to the agent which the agent supposed forbade his acceptance of the draft, though the draft was very soon afterwards accepted and paid. This circumstance induced a renewal of the importunities and demands upon her for a settlement which should place something irrevocably at the disposal of Mr. Cruger. She was urged to this by her brother-in-law, Mr. Monroe; and she finally yielded so far as to sign an instrument addressed to Mr. Monroe, dated 26th of October, 1839, by which she declared that her husband's power to draw the whole income, as it accrued during his life, should be deemed irrevocable. And this was followed up by her executing a deed of the 2d of November, 1839, which purported to settle upon her husband the whole income of the estate, real and personal, during his life, excepting the share which belonged to her of her deceased mother's

Cruger v. Cruger.

and sister's estates, upon this being done, the husband executed a deed of appointment on his part, dated the 5th of the same month, referring to her deed of the 2d, by which he directed the trustees to pay to her so much of the income as would, with what she had reserved to herself, constitute one half of the whole income of the estate.

These instruments, however, proved entirely unavailing. Mrs. Cruger had intimated at the time of executing the deed on her part, that her husband's acceptance of it would be the means of separating her from him. The declaration was made in pursuance of a determination long previously formed, and never meant to be departed from, that if constrained to give him an irrevocable power over the income she would not live with him while he held it. The prediction was verified; for, on his coming to town, after exchanging the papers, he found that she had left their house and had gone to their brother's, and that she refused to return and live with him, so long as he retained the deed and claimed any rights under it. This state of things continued until the 22d of February, 1840, when Mr. Cruger, being at Washington, endorsed upon the deed a surrender and cancellation of it and sent it to her. From Washington he proceeded to Charleston, South Carolina, where he remained until the following June. He then came back to New-York, and found Mrs. Cruger had gone to Henderson, where she remained apart from him all the summer. Now again the friendly advice of Mr. Bard was offered, in a letter addressed to her, expressive of much good feeling and concern for the happiness and honor of both, and strongly urging her, for both their sakes, to make a settlement of some portion of the income upon her husband, that should be permanent and irrevocable. She promptly replied to Mr. Bard's letter, placing at his disposal the whole of her then income, so that he might decide what portion of it should be assigned irrevocably to Mr. Cruger; and after he had decided, then authorizing him to have the proper instrument prepared and forwarded to her for execution. A deed of the 7th of September, 1840, was accordingly prepared and sent to her, which she executed and re-

Cruger v. Cruger.

turned to Mr. Bard, and the same was thereupon delivered to her husband. By this deed she assigned to him out of her income, an annuity of three thousand dollars, to be paid to him during his natural life. Notwithstanding this deed had all the appearance of being a perfectly free and voluntary act on her part, and, as he says, was intended as an adjustment of all difficulties between them, and to bring them together again, yet it would seem from her statements, that she executed it without any view to cohabitation, and that she still meant not to depart from her purpose of living separate, provided he accepted the deed, and should undertake to claim an irrevocable power over even so much of her income. If such was her resolution at that time, it is certain, however, that she did not long adhere to it. On his proceeding to Henderson, soon after receiving the deed, she became reconciled, and they were again united; so that in November following they came to town and took up their residence for the winter at her house, 55 Broadway, where they continued to reside in external harmony until some time in June, 1841.

Then it was that she again separated from him, and they have not since resided together. The immediate cause of this, their last separation, does not very distinctly appear. A variety of circumstances may have contributed to it. Mrs. Monroe, who was present when she left, says it was owing to some misunderstanding about money matters; that neither Mr. nor Mrs. Cruger seemed to understand each other's views on money matters; that Mr. Cruger expressed his disapprobation of her going—opposed her going, but nevertheless handed her to her carriage. But it is not very important, at present, to ascertain more particularly the cause. I only advert to the fact of their separation, in connexion with other prominent matters that have occurred since 1835, in relation to the husband's acquiring an interest in or a control over the income of her estate, in order to come at that part of the case which I am now about to consider, and upon which the right and claim of the husband to any interest or ownership in the property entirely depends. I refer to her deed of appointment, of the 19th of

Cruger v. Cruger.

November, 1841, the last she ever executed, and by which, according to its purport, she irrevocably assigns, transfers and appoints to her husband, in pursuance of the power contained in her post-nuptial settlement with him, (meaning his deed of the 29th of June, 1833,) the one equal half part of the net income of all her estate, real and personal, for and during the rest of his natural life, from and after the first day of November then instant, and directs the trustees of her estate to pay to her husband such moiety of the income accordingly, declaring the provision thereby made to be in lieu of the annuity of three thousand dollars. This deed is a matter of vital importance to the husband, provided I am correct in my views as to the validity of the original deed of settlement, and as to the effect of the order of the 15th of July, 1833.

If found to be a valid instrument, both upon the law and the facts of the case, then he is entitled to the aid of the court in carrying its provisions into effect. But should it fail of support, so necessary to its validity, then there is nothing left for the husband to fall back upon, within the province or jurisdiction of this court to enforce, unless, indeed, the court can reinstate the annuity which was surrendered when the deed in question was delivered; the grant of which annuity, however, is now as strongly impugned as is the deed which succeeded it. The form of this last instrument, as a deed of appointment, is not objected to; but it is insisted in the first place that Mrs. Cruger had not the capacity legally to make such a deed, or any other instrument purporting to convey or to dispose of the income. The *power* as expressed in and intended to be conferred by the husband's original deed of settlement is broad enough to authorize her to dispose of the income as well as the principal, either by deed or will; and it is that sort of power which a married woman, notwithstanding coverture, is expressly authorized by the statute of powers, to execute by herself, without the presence or concurrence of her husband. (1 R. S. 735, § 110; *id.* 737, § 130.) But the objection lies deeper. It is based upon the disabling or prohibiting language of the 63d section of the statute of uses and trusts, which it is contended renders

Cruger v. Cruger.

her legally incompetent thus to part with or dispose of her income. That section does indeed declare that "no person beneficially interested in a trust for the receipt of the rents and profits of land, can *assign* or in any manner *dispose of* such interest;" though where a trust for the payment of a sum in gross is created, the right and interest of a beneficiary may be assigned. This provision of the statute applies only to rents and profits, or to sums in gross payable out of real estate; although by a subsequent statutory provision, the income of personal property is placed upon a similar footing, and subjected to the like rules. (8 *Paige*, 85.)

The question is therefore presented whether the deed in question is such an assignment or disposition of the income as the 63d section has prohibited and rendered nugatory. The law having authorized the creation of trusts, and especially trusts for the purposes specified in the 3d and 4th subdivisions of section 55, it became necessary to throw around them some guard against an improvident disposition which the beneficiaries of such trusts might be tempted to make of what was intended for their *continuous* support, and to meet their constantly accruing and future wants, such beneficiaries being generally persons of improvident habits, or under some condition of helplessness or dependence; and hence the 63d section was enacted. It was probably intended, moreover, to support and give effect to the clause *against anticipation*, commonly introduced into deeds and wills, creating settlements for the separate use of married women, as to the effect of which clause, nice and difficult questions were liable frequently to arise. (See *Kent's Com.* 5th ed. and 1 *Beavan*, 1.) No such clause appears, however, in the deed in the present case; and the other branch of the mischief which it was the policy of the 63d section to guard against seems to be equally inapplicable and foreign to the present purpose. The effect of the deed appointing one half of the net income to the husband is not to break up the trust; for the object of the trust is not thereby essentially or materially changed. The trust is still to endure. The trustees are to go on receiving the rents and income and making the application

Cruger v. Cruger.

thereof in moieties, according to the directions she has given, and the appointment she has made, all of which is in conformity with the power conferred upon her. This is very different from a sale of her interest under the trust. It is not a parting with the continuous and constantly accruing benefit it was intended to be to her, for a benefit in *gross*, or an *anticipation* of all the benefit of the trust and a termination of it, so far as she is concerned.

The opinion expressed by the chancellor in *Gott v. Cook*, (7 *Paige*, 538,) and by Mr. Justice Cowen in *S. C. in error*, (24 *Wend.* 667,) appears to me to favor the distinction which I make between putting an end to the original beneficiary's interest under the trust, thereby virtually defeating the object of it, and the doing of that which is only an appropriation of the benefits resulting from it, in a manner compatible with its object and its creation. I think the latter is the sense in which this deed is to be regarded, and, consequently, that it does not fall within the prohibition of the 63d section.

The other objections taken to the deed depend upon the circumstances under which Mrs. Cruger was induced to execute it. She states in her answer, (and in her cross-bill the charges are substantially repeated,) that having returned to the city on the 18th of October, 1841, from her country residence, she went immediately to the house of her cousin, Mrs. Kane, where she met Mr. Cruger, and had a very painful interview with him. That at that time, as she believes, he had made up his mind to live separately from her, and to obtain as large a grant as practicable of her income, and for this purpose he engaged the services of Mr. Monroe, her brother-in-law. That Mr. Monroe, accordingly, alone, or conjointly with Mr. Cruger, instructed Mrs. Monroe, her only surviving sister, to procure from her an appointment of one half of the income to the use of Mr. Cruger. That all the acts and proceedings of Mrs. Monroe to accomplish that object were guided by Mr. Cruger, either directly, or indirectly, through the agency of Mr. Monroe. At the same time, by some indirect means, Mr. Cruger procured Mrs. Kane and Mr. Ogden to aid and assist him in his designs upon the in-

Cruger v. Cruger.

come. That Mrs. Monroe, aided and seconded by Mrs. Kane and Mr. Ogden, addressed her and requested that she would settle upon Mr. Cruger one half of the income of her estate. To this she replied that by virtue of an offer made in June previously, through her counsel, Mr. Strong, and still subsisting, Mr. Cruger had the liberty to take nearly the whole of the income, and it was therefore unnecessary to apply to her for a smaller sum. (The offer in June, alluded to, involved a condition that, if accepted, she would live separate from him, and had therefore been rejected.) That her sister, Mrs. Monroe, treated such reply with ridicule and derision, stating that she had no right to give the whole, but was bound, in order to save herself from general censure, to give one half. That Mrs. Monroe, so aided and seconded by Mrs. Kane and Mr. Ogden, pursued the application for a settlement of one half of the income upon Mr. Cruger, so unceasingly, and in so harassing and importunate a manner, as to leave her no peace or quiet. That she resisted the importunities of her sister to the utmost of her ability; but at length her powers of resistance wholly failed her, and she yielded to the requisition of Mrs. Monroe, and directed her counsel (Mr. Strong) to draw the required settlement. She further says, that Mr. Strong accordingly drew up an instrument, bearing date the 26th of October, 1841, purporting to settle one half of the income upon Mr. Cruger for her life, instead of his life, which she executed, but which he refused to accept or receive. That in this stage of the controversy she was again addressed by her sister, aided by her cousin and Mr. Ogden—that she was charged with duplicity in giving private instructions to her counsel to draw the instrument in such unsatisfactory form, and was censured for unreasonable obstinacy, and threatened with public odium; and with renewed and continued importunities, she was at last compelled, in order to secure her tranquillity, to agree to make the settlement upon her husband, of one half of the income during his life. That having so yielded she sent for Mr. Strong, and caused instructions to be given to him to prepare the deed of settlement accordingly.

Cruger v. Cruger.

That the draft was prepared and submitted to Mr. Cruger, who, instead of acquiescing in it, proposed a different deed of settlement, but on being informed that his proposed deed would not be executed, he finally, after considerable hesitation, and on or about the 17th of November, signified to Mr. Strong that he would accept as satisfactory the deed prepared by him; whereupon it was engrossed, and she executed and acknowledged it, under date of the 19th of November, 1841, and sent it to Mr. Strong, who delivered it to Mr. Cruger.

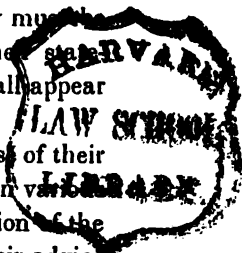
She then denies that Mrs. Monroe, Mrs. Kane, and Mr. Ogden, or either of them, had any right to suppose that the deed could or would form a basis, just, reputable, or otherwise, of a re-union between herself and her husband. On the contrary, she says it necessarily formed a cause of continued separation, inasmuch as she had *uniformly* declared that she could not live with her husband, so long as he persevered in possessing himself of a legal right to any part of the income of her estate. That in the summer previous he had declined to receive a settlement on the condition that she was to live apart from him, and yet in order to secure the co-operation of her sister and cousin, and to avoid the odium of accepting a settlement on such disreputable terms, he held out to her sister and cousin the idea that such settlement, when made, would satisfy his mind, restore harmony, and thus lead to a re-union between them; at the same time he well knew that she had determined not to live with him under such circumstances. She then says that the deed was not a free and voluntary act on her part; that it was obtained in opposition to her will, and by the persevering and vexatious importunities of her husband and his agents; that it was obtained fraudulently, against good faith, and contrary to the true intent and meaning of what she claims to have been an ante-nuptial agreement and the husband's deed of 29th of June, 1833. That although no physical force was employed to compel her to execute the instrument, and admitting as she does that at the time of executing it she was under no personal restraint or duress, and that she executed and acknowledged it with all the form and ceremony of a free and

Cruger v. Cruger.

voluntary act, yet she says it was by undue persuasion and coercion, growing out of his importunities and persecution of her for years, and his threats that he would continue to destroy all her peace, comfort, and happiness, until she made such a settlement of her estate upon him as he should be content to accept, that she was brought to execute it.

Such are alleged to have been the means resorted to, and practised upon her, to obtain the deed. If true, there can be no doubt as to the duty of this court in regard to the transaction. The deed could not be allowed to stand; much less would the court lend its aid in carrying it into effect. And here I may remark that much of what is thus alleged against the *morale* of the deed is either in denial of, or responsive to, statements put forth in the original bill calling for an answer under oath. The burthen of disproving these denials and responsive assertions, therefore, rests upon the husband; and to this end he has called upon Mr. and Mrs. Monroe, and Mr. Ogden, for their testimony respecting the part taken by them, as well as by Mr. Cruger himself, in bringing about this arrangement and deed of settlement. Although these three witnesses are the persons chiefly implicated as conspiring with Mr. Cruger in this business, yet they are competent to testify, and their testimony must be believed, unless there is other evidence to refute the statements, or upon the face of their own testimony it shall appear to be incredible.

Both Mr. and Mrs. Monroe freely admit, in the course of their lengthy and searching examinations, that often, and on various occasions during a series of years prior to the separation of the parties in June, 1841, they did interfere, and by their advice and influence endeavored to prevail on Mrs. Cruger to make a permanent and irrevocable settlement upon Mr. Cruger of some large portion of the income of her estate. That this they urged upon her frequently when the subject of her income became a matter of discussion and controversy between them, so as to threaten the loss of her domestic peace and happiness, and to become painful to the feelings of those so nearly and dearly connected with her as were Mr. and Mrs. Monroe and family;



Cruger v. Cruger.

that this was done both verbally and by written communications, in the most urgent and persuasive manner, but was always most kindly meant, from a belief that her own happiness would be promoted by it, and from a wish to see her placed upon high ground with respect to her husband and the opinion of the world.

When Mrs. Cruger came to town in October, 1841, and did not go to reside with her husband at 55 Broadway, where he then was, these efforts were renewed by Mr. and Mrs. Monroe, and particularly by the latter, in the hope of inducing Mrs. Cruger to make the settlement, and return to and reside with her husband, and thereby conform to the wishes of her best friends. Mrs. Monroe is asked, upon her cross-examination, to give the substance of the conversations which it appears she had with Mrs. Cruger on that subject, two or three times shortly after she came to town, partly at Mrs. Monroe's house, 30 Varick-street, and partly at Mrs. Kane's, 52 Varick-street, at one of which she thinks Mr. Cruger was present, and also Mrs. Kane, and at another Mr. Ogden and Mrs. Kane were present. She says the conversations were not very long, at least not all of them. She did earnestly entreat her sister to make the deed and place herself on high ground. It was her sister she thought of, to make right. The conversation most deeply impressed on her mind was one held in Mrs. Kane's house when she said, "My sister, only do right; put yourself on high ground, and divide your income with Henry, giving him half that you cannot take back; then try, and if you are not happy with Henry, and he not contented, I will give him up and go to you." In answer to a further interrogatory, she says she expressed herself to this effect: "Mrs. Kane, Mr. Ogden, Mr. Whetten, every one of us that loves you, wishes you, Harriet, to do this—do, Harriet, for all our sakes." She further says—"I did not say to her, 'You cannot maintain your own respectability or that of your relatives, without making it.' I had no view but for my sister. I urged her, from the bottom of my heart, to do what I asked of her. I used no argument but affection." In relation to the charge that these efforts of Mrs. Monroe to procure a deed from her sister, were stimulated

Cruger v. Cruger.

by Mr. Cruger, through the instrumentality or agency of Mr. Monroe, who instructed, guided, or directed his wife's movements in that respect, Mr. Monroe expressly declares that Mr. Cruger never at any time engaged his services or secured his agency, to obtain for him half of the income of Mrs. Cruger's estate, or that he alone, or conjointly with Mr. Cruger, ever instructed or directed Mrs. Monroe to procure from her sister such a grant. He says that at no time whatever did any thing pass between himself and Mr. Cruger on the subject, except when he spoke to Mr. Cruger about having some arrangement made that should be definite and unchangeable respecting the income; at which times Mr. Cruger declared himself disposed to leave the whole matter to Mrs. Cruger and her friends. He says, moreover, that in the frequent conversations between himself and Mrs. Monroe he found that their views corresponded in relation to Mrs. Cruger; and that he never did advise Mrs. Monroe to use her influence and powers of persuasion with Mrs. Cruger, to effect any object with her; that Mrs. Monroe would attempt nothing of that sort which was not in accordance with her own views, and her own feelings of affection towards her sister; that whatever he, Mr. Monroe, had done towards influencing or persuading Mrs. Cruger into a settlement, was done out of regard for her and her happiness; and most generally without the knowledge or concurrence of Mr. Cruger, except that Mr. Cruger had always declared that he would cheerfully concur in any thing her friends might decide upon.

It is unnecessary, for the present purpose, to go more at length into the testimony of these two witnesses. What I have thus stated comprises the substance of all that I deem material to show the character and kind of influence which they appear to have exerted with Mrs. Cruger, in producing the results complained of by her.

The testimony of Mr. Ogden, in regard to the character of his interference and advice, is not very different. He, it appears, was an old and intimate friend of the Douglass family; one who could have had no motive for advising Mrs. Cruger in any thing, except in that which he honestly and sincerely believed

Cruger v. Cruger.

to be right, and promotive of her happiness and welfare. He was in New-York during the whole of October, and as late as the 10th of November, 1841 ; on which day he embarked for England. In October, and at least a fortnight before he sailed, he met Mrs. Cruger, at Mrs. Kane's, in Varick-street. It was in the evening. Mrs. Monroe was also there. He had taken leave of the ladies. Mrs. Cruger followed him to the door, and as he was on the steps going away, she urged him to return and converse with her on the subject of her existing difficulties with her husband, and to give her advice. At her pressing solicitation, resisting it, however, for some time, he agreed to listen to her story, and did return into the house, and had a long conversation with her. Mrs. Kane and Mrs. Monroe were present. The conversation most to the point, he says, was her declaration that she had always intended to settle the whole of her income upon her husband, revocable at her pleasure. He, Mr. Ogden, gave it as his opinion that a certain part of her income, or a certain sum, should in justice be settled on her husband during his life. After a great deal had been said, she agreed that the settlement should be of one-half of her income, and solemnly declared that she would carry it into effect. She said, "Mr. Ogden, I will sit down this very night and write orders to my solicitor to do so." He told her that such haste was unnecessary ; that to-morrow, or the next day, after she had reflected on it, would answer the purpose. "I repeatedly told her (he continues) that my only cause for giving this advice was my friendship to her, and to set her right before the world. I told her that I frequently had heard it the subject of conversation, and that she was blamed for the conduct she had pursued. We parted, on this occasion, on the most friendly terms." He further says, on his cross-examination, that in the course of the conversation he told Mrs. Cruger that he was speaking to her as *her friend*, and not as the advocate of Mr. Cruger, in whom he felt no comparative interest ; that the advice he gave her was from a conviction in his mind that it was right, and that he gave it to her that she should be enabled to take a high stand before the world. In answer to the question, "Did you,

Cruger v. Cruger.

at that time, advise that the settlement should be for his (Mr. Cruger's) life?" he says, "I did most distinctly;" and he was led to do so from a belief that no permanent amicable adjustment could be made which rested on the sole will or caprice of the party making the settlement.

It was in pursuance of this advice that Mrs. Cruger gave directions to Mr. Strong, her solicitor, to prepare the deed which was drawn and signed by her under date of the 26th of October, 1841, purporting to be for her own life, and which was rejected. Afterwards, and on the 8th or 9th of November, Mr. Ogden had another interview with Mrs. Cruger at her brother's (Mr. William Douglass') house in Park Place. He there entered into a further conversation with her, in which he told her that he had understood a deed had been made out in favor of Mr. Cruger during her life, and inquired whether she understood that to be the meaning of the advice he had given her. She replied that in the directions to her solicitor she had not ordered him to make out the papers in that way. He then remarked, in that case the solicitor was unworthy of her confidence, as he had presumed to make a change in her intentions. She persisted, however, that the papers should continue as they were drawn. On that account the conversation became an animated one. Mrs. Cruger was greatly excited, walked the room, and expressed herself very strongly, and in terms highly derogatory to the character of her brother-in-law, Mr. Monroe. To which the witness replied with some warmth, though in other respects he says he spoke plainly in the language of truth, without passion or feeling. In reply to her exclamation that "all the world had turned against her, and that I, even, had joined her enemies," he said "No, Mrs. Cruger, you are your own worst enemy; if any friend, however dear to you, ventures to differ in one single point from your opinion, you set them down at once as an enemy." The witness says further it was an angry conversation towards the close of it. It can hardly be said to have terminated amicably, for she persisted in her intentions, and he had his views on the subject, which were opposite to those entertained by her. Up to the time he parted

Cruger v. Cruger.

with her he understood that she did not yield her assent to making the settlement for his (Mr. Cruger's) life. Her brother, William Douglass, and Miss Bleecker, were present during the conversation, but took no part in it, of any moment.

With regard to this last interview, it appears to have been brought about solely at the instance, and upon the invitation of Mrs. Cruger. Mr. Ogden did not seek it, nor does it appear that Mrs. Kane, Mrs. Monroe, or Mr. Cruger were at all privy to it. Mr. Ogden had shortly before heard, through Mrs. Kane or Mrs. Monroe, or both of them, (between the 1st and 8th of November,) of the making and tender of the deed of the 26th of October, and had expressed his astonishment at its being limited to her life; but has no recollection of having seen or conversed with Mr. Cruger on the subject between the time of the first and last conversations with Mrs. Cruger, or of having seen Mr. Cruger and Mrs. Monroe together during that interval.

It appears moreover from Mr. Ogden's testimony, that in the summer of the preceding year, (1840,) he had visited Mrs. Cruger at Henderson, upon her invitation, and there the subject of a settlement and adjustment of the difficulties with her husband were discussed; and at which time he had very frankly expressed his opinion in favor of a settlement of a part of her income upon her husband, that should be irrevocable, as the only means of reconciling them, and of enabling them to live amicably together, and had advised her against making a settlement of the income during her pleasure, as she repeatedly said it was her intention to do. To the question, "Did Mr. Cruger at any time request you to exert any influence with Mrs. Cruger on the subject of those difficulties?" the witness answers "Never! It was at the solicitation of Mrs. Cruger alone, and as her friend, that I gave the advice." The question thus put and answered relates to every instance in which Mr. Ogden conversed with Mrs. Cruger, and gave advice in relation to her difficulties and the best mode of settling and avoiding them in future. So far as he was instrumental in the matter, and so far as his advice or opinions may have influenced her to make a settlement of one-half of her income, and to

Cruger v. Cruger.

make that settlement irrevocable, and that too for her husband's life instead of her own, Mr. Ogden certainly exculpates Mr. Cruger entirely from all agency in bringing that influence to bear on her mind. The same may be affirmed of the testimony of Mr. and Mrs. Monroe, in respect to the part which they took, either conjointly or separately, to induce Mrs. Cruger to make such a settlement. Neither of the three acted with any view to serve the mere selfish purposes of Mr. Cruger, by procuring for him one-half of the income of the estate. It is impossible to believe that they, who stood in the relation that these parties did to Mrs. Cruger, including Mrs. Kane, her intimate friend and near relative, could have been actuated by such a motive, even if they had not told us of higher and nobler motives of action, proceeding from feelings of friendship and affection towards Mrs. Cruger, and from a desire to serve her in that which would contribute most to her welfare, her own domestic peace and happiness, and secure to her the high stand which she had all along occupied in society, and before the world, and in the estimation of her numerous friends. To this end, and from such motives, they were induced to exert their influence, and to persuade Mrs. Cruger to make such a deed of settlement as she finally executed. In so doing, they appear to have been governed by considerations altogether personal to Mrs. Cruger, intending to benefit her, though at the same time it could not fail to benefit her husband; yet he was not, nor were his interests, the object of their solicitation. He was but a passive party, ready to abide by whatever should be done by her that her friends might sanction and approve.

It is true Mr. Cruger was so far active as to reject the deed of the 26th of October, but that was because it was not in accordance with the agreement and the solemn promise she had made. It is true moreover, that he proposed the form or draft of a deed, such as he understood had been determined upon; but finding her unwilling to execute any other than her solicitor should prepare, he yielded, and accepted the deed of the 19th of November. Under these circumstances can it be said that Mr. Cruger succeeded in obtaining it by undue means?

Cruger v. Cruger.

That he took no active measures to obtain it, seems to me abundantly proved ; and the leading charge of the answer, that he enlisted her friends in his service, prevailed on them to interfere and exert their influence, and finally, through their instrumentality, guiding and directing their movements, succeeded in bringing about the result, so far from being supported by any evidence, is, in my judgment, completely disproved, not only by the positive testimony which I have quoted, but by strong presumptive evidence which the circumstances of the case, the relations which the parties implicated stood in towards Mrs. Cruger, and their highly respectable and honorable characters unquestionably furnish. There is no ground, therefore, for imputing to Mr. Cruger the exercise of any undue influence, coercion or misconduct, in obtaining the deed, either by himself or through the medium of other persons instigated by him, or whose officiousness he had secured.

The question still remains, however, whether, executing the deed under the advice and pressing solicitations of her friends, urged upon her in the manner they have described, and from motives like those before mentioned, she is at liberty to retract and avoid it? In looking at the transaction with a view to this question, it must not be forgotten that there was a dispute, mainly attributable to the want of a proper formal and permanent marriage settlement. This dispute had before produced temporary separations ; and now again it had resulted in a separation which threatened to be more lasting, and in which the wife herself had chosen to be the party to leave her house and to keep herself aloof from her husband, he remaining, ready to receive her whenever she might return. In the hope of bringing about a re-union and restoring harmony, her near relatives, and other intimate and personal friends of hers, interpose their kind advice, or she seeks advice from them. Their advice she determines to be governed by. She nevertheless wavers, and at length recedes. Her friends chide and entreat and importune, until she is brought back to her first resolve. She then executes the deed, and acknowledges it in a deliberate manner, before a proper officer, and in the presence of a

Cruger v. Cruger.

brother, who must have known most, if not all, of the circumstances which led to it; and he and a sister-in-law sanction the act by their subscription as witnesses. Her husband was not present to overawe her. Her importunate friends were not then surrounding her—one of whom was on his way to England. At that time she was free to act as she pleased; unconstrained, except so far as she may have felt bound in honor and conscience to fulfil the promise she had made to them, or was afraid of again incurring their displeasure by refusing to execute the deed. If the former was the case, she can hardly be allowed to say that she executed it against her will, and the convictions of her own mind; and the latter will avail but little as an excuse for one who is proved to be "remarkably pertinacious in her opinions, not easily persuaded, and certainly not to be intimidated from them."

The deed, moreover, is but a reasonable settlement of this family matter. There is nothing inequitable or unconscionable in its provisions. Such a deed, free from fraud, though a voluntary one, yet made with a view of effecting a family settlement, a court of equity will seek to uphold, rather than to destroy, for obvious reasons of public policy, as well as for the sake of the peace of families.

Though the deed has not been attended with the good results which were expected from it by her friends, but has rather had the effect, as it would seem, to estrange her the more from her husband, and in some degree to sever the ties of friendship and affection between herself and sister, yet this furnishes no argument against the validity of the deed, nor any sufficient ground for not giving immediate effect to it. All this may have proceeded from some idiosyncrasy of mind that time may overcome; and the day may possibly not be far distant when the object of her friends, in recommending this deed of appointment may be fully realized, notwithstanding the assertion in her answer that they had no right to suppose it would form the basis of a re-union between her and her husband, since she had uniformly declared that his acceptance of an irrevocable power over any part of her estate, or its income, would be the cause

Cruger v. Cruger.

of a continued separation on her part. A re-union, however, was but one of the objects they had in view. If that failed, there was another, which would be accomplished by her settlement of one-half of the income upon her husband. It would show her generosity and magnanimity, and in that respect, "set her right before the world."

There is another point in respect to Mr. Cruger himself, which must be briefly noticed. He is charged with obtaining the deed *fraudulently*, and in *bad faith*, well knowing that it would not be the means of restoring harmony between them. This is answered by the evidence, showing that he was but a passive party, and had no hand in procuring it, other than as a mere recipient, when the deed was offered and sent to him. But the charge of fraud and bad faith goes farther. His mere acceptance of the deed, and his attempt to claim any rights under it, are alleged to be contrary to good faith and the true intent and meaning of an *ante-nuptial agreement*, and the deed of the 29th of June, 1833, consequent upon it. In the former part of this opinion, I have expressed my belief that there was no *ante-nuptial agreement* by which the property, and its income, were to be settled exclusively upon, and to the use of, the wife. And it is sufficient to say, with respect to the husband's deed of the 29th of June, that it contains in itself a power of appointment in the wife, and that there can be no fraud or bad faith on his part in assuming or claiming rights purporting to be conferred upon him by any deed executed in pursuance of such power.

In examining this important, and, to the parties, deeply interesting case, there are many facts and circumstances, scattered throughout a large mass of testimony, and numerous letters and papers made exhibits in the cause, which have given rise to much ingenious and elaborate discussion by the very able counsel on both sides. These have not escaped my attention; but it is unnecessary to present them here at length. They relate to matters which doubtless have had an influence upon the motives and actions of the parties in this unhappy domestic controversy, and especially as inducing Mrs. Cruger to under-

Cruger v. Cruger.

take the repudiation of the deed, after having quietly acquiesced in, and abided by, its provisions for a considerable length of time.

It has been strongly put by Mr. Cruger's counsel—and there is reason to believe it, from the evidence—that this attempt is owing to the officious interference of an individual, whose calling should have led him to holier and better purposes than the fomenting of domestic strife, and the encouragement of devastating litigation. But with this I have nothing to do.

A decree must be entered, establishing the deed of the 29th of June, 1833, and the deed of appointment of the 19th of November, 1841, and holding the trustees to an accountability to Mr. Cruger for an equal moiety of the net income of the estate.

C. O'Connor, for the appellant Mrs. Cruger.

Geo. Wood, for the respondent Mr. Cruger.

By the Court, STRONG, P. J. That part of the decree of the late vice chancellor, from which no appeal has been taken, affirms the validity of the post-nuptial settlement, executed by the husband immediately after the marriage of the principal parties, and declares the inefficacy of the several appointments, gifts or conveyances of Mrs. Cruger in favor of her husband, intermediate such settlement and the deed of the 19th of November, 1841. The counsel for the respondent contended on the argument, that the appeal from that part of the decree establishing the last mentioned deed opened the whole case as presented by both parties in the court below for review, and that it is competent for us still to grant the relief claimed in his bill. An appeal from a part of a decree which is so inseparably connected with the remaining portion of it that the whole must necessarily stand or fall together, or which cannot be reversed, leaving the part not affected by the appeal in full force, without effecting great and irremediable injustice, might possibly bring up the whole case for reconsideration. But neither is the case here. Ordinarily, as was remarked by Chief Justice Kent, in *Sands*

Cruger v. Cruger.

v. *Codwise*, (4 *John*. 602,) "it is a rule of practice from which we ought not to depart, that when the petition of appeal recites specifically the parts of the decree of which it complains, and from which the appeal is made, the appellant," (and he might have added the respondent,) "is to be confined to those parts of the decree." Although the *validity* of the post-nuptial settlement cannot now be questioned, it is perfectly competent for us to examine its terms, to see whether they authorize the conveyance of half the income of Mrs. Cruger's estate agreeably to the deed of the 19th of November, 1841. The construction of such deed, to that extent, is necessarily involved in the appeal. Indeed it expressly includes that part of the decree which declares that such deed is a good and valid appointment under the power contained in the settlement.

By the post-nuptial settlement Mr. Cruger conveyed to trustees for the benefit of Mrs. Cruger all his estate in the property, real and personal, which belonged to her at the time of their marriage, and his powers over it; and he of course conveyed no more. The law very clearly defines what such estate and powers were. He was entitled to the possession of her real estate, and to the receipt and enjoyment of the rents and profits, during their joint lives, and to her personal estate absolutely. Of course he had the power of disposition, to the extent of his rights, subject to the equitable claim of his wife, under circumstances which it is unnecessary to mention, to a suitable settlement. By his conveyance the right to the possession, and the income of the real estate, and the whole personal estate, passed to the trustees. The power of disposal given to Mrs. Cruger, extended only to the possession and income of the real estate, although it was absolute as to the principal and income of the personal property, subject, however to such provision (if any,) of the revised statutes as may have been applicable. It follows that the husband could not convey to trustees for the benefit of his wife, the right to dispose of the fee in the real estate at any time, nor of the rents and profits after his decease. Those were unaffected by his conveyance, and remained the same as if no such instrument had been made.

Cruger. v. Cruger.

The deed from Mrs. Cruger, of the 19th of November, 1841, in terms conveys to Mr. Cruger, during the remainder of his natural life, the one equal half part of the net income of all and singular her separate fortune and estate, both real and personal. There are two questions as to the validity of this instrument; 1st. Whether Mrs. Cruger had the requisite power to transfer the interests which it purports to convey; and 2d. Whether it was made under circumstances to which a court of equity will give its sanction. The question as to Mrs. Cruger's power over her property, so far as it relates to the efficacy of the instrument in question, I shall consider in reference, first, to the real estate, and second, to the personal estate.

The counsel for Mr. Cruger contended on the argument that the power of Mrs. Cruger to dispose of the income of her real estate was absolute, under the 87th section of the revised statutes relating to the nature and qualities of estates in real property, and their alienation. That section provides that "a special and beneficial power may be granted to a married woman to dispose during the marriage, and without the concurrence of her husband, of any estate less than a fee belonging to her in the lands to which the power relates." The settlement gives to Mrs. Cruger the power to dispose of whatever it conveyed to trustees for her benefit, by deed or will, "in all respects as if she were unmarried"—that simply unbinds the shackles of matrimony as to her rights over the property, but clearly gives her no power in addition to those which she would have possessed had she been a feme sole. Those rights were conferred by a deed in trust, and must of course depend upon its validity. The vice chancellor considers the trust valid under the 3d subdivision of the 55th section of the statute relative to uses and trusts, which provides that an express trust may be created to receive the rents and profits of lands, and apply them to the use of any person, during the life of such person, or for any shorter term, subject to the rules prescribed in the first article of the title. This, if the construction be correct—and, so far as the interests of these parties in the cause are involved, it is *res judicata*—necessarily subjects the interest

Cruger v. Cruger.

and power of Mrs. Cruger to the provisions of the 63d section of the same statute, which declares that "no person beneficially interested in a trust for the receipt of the rents and profits of lands can assign or in any manner dispose of such interest." This was intended to prevent the many evils arising from the anticipation and premature conveyance, of such rents and profits, and most assuredly is as essential to protect the interests of married women, as of any other persons. The vice chancellor supports the conveyance of the rents and profits in this case, on the ground that the receipt of such income by the husband may be for the use of the wife. That may be or may not be so. An order to receive the rents and profits, such as was granted by Mrs. Cruger shortly after the marriage, might be of that character, because she might continue it so long as he should devote such income faithfully to the mutual benefit, and revoke it when he should squander the property for other purposes. But an irrevocable transfer of the income to him during life could never be considered in the same light. It would enable the husband, unless prevented by a court of equity, to abstract every cent of it from the use of the wife, and in effect to contravene the main object of the instrument, which was to place the income of the property under her sole control, as essential for her use and benefit. I conceive, therefore, that Mrs. Cruger's deed to her husband of the 19th November, 1841, did not confer on him any right to receive any part of the future rents and profits of the real estate.

The next question is whether, as the vice chancellor supposes, the income of the personal estate is placed by another section of the statute upon a similar footing, and subjected to the like rules. The provision of the revised statutes relied on by the learned judge, and also by Chancellor Walworth in *Clute v. Bool*, (8 *Paige's Rep.* 83,) is contained in the 2d section of title 4 in chapter 4 of part 2 of the revised statutes, which declares that limitations of future or contingent interests in personal property shall be subject to the rules prescribed in the first chapter of the act in relation to future *estates* in land. The chancellor thinks that the 36th section of the article rela-

Cruger v. Cruger.

tive to the creation and division of estates, constitutes the right to receive the rents and profits of land at any future period a future estate. With great deference I cannot agree with him in his construction of that section. It provides that "dispositions of the rents and profits of land to accrue and be received at any time subsequent to the execution of the instrument creating such disposition, shall be *governed by the rules* established in this article in relation to future estates in lands." Now this does not declare, directly or by implication, that such dispositions shall be deemed future estates. The statute could not have consistently done so after having defined, as it does in the 10th section of the same act, a future estate as "an estate limited to *commence in possession* at a future day." The right to receive the rents and profits, in this case, commenced at the instant when the instrument creating it was delivered, and was clearly an estate in possession, within the meaning of the 8th section of the same act. The 36th section merely declares that dispositions of the rents and profits of real estate shall be governed by the rules applicable to future estates, not that they shall be deemed future estates. If it had designed to constitute them future estates it would have said so in direct terms. The provision that they should be governed by the same rules would then have been unnecessary. Besides, upon every sound principle of construction, a reference to a term used in a statute must be in its direct and primary sense, as expressly defined, and not in an assimilated interpretation. And that rule is more especially applicable when, as in this case, the express meaning will accomplish all that was designed by the framers of the law.

It is not however absolutely necessary to decide the question as to the alienability of the income of personal property, in the view which I take of this case. Mrs. Cruger's interest in her personal property was neither "future nor contingent." She had the absolute right of disposal of both principal and interest. As there is nothing in the trust deed of settlement providing for the accumulation of the income, or suspending the absolute ownership beyond the period of two lives in being, it nowhere

Cruger v. Cruger.

militates against any provision of the revised statutes, and is valid by the rules of the common law. The absolute right of disposal gave her the power to convey the principal, or the income only, or any part of either. The conveyance of the 19th of November, 1841, was therefore, so far as it relates to the income of the personal estate, authorized by the terms of the post-nuptial settlement.

The counsel for Mr. Cruger contended that, assuming the income of the real estate to be beyond the disposal of Mrs. Cruger, this court should divide the whole, by giving the husband the income of the personal estate which is disposable, or so much thereof as will equalize the whole between the parties, as the same stood on the 19th of November, 1841. I was at first strongly inclined against this position, considering the conveyance to be of the half of two distinct subjects; the rents and profits of the real estate and the income of the personal property. But on examining the deed of November, 1841, more thoroughly than I could on the argument, I am inclined to think that it conveys the half of the whole income, as one subject matter, and that if Mrs. Cruger had the power to convey *so much* of her income, come from what source it may, the instrument shall operate upon that part of it. I am the more inclined to adopt this construction, as it will the best effectuate the intention of the parties at the time when the transaction took place. If therefore the instrument is free from other objections, it must be adjudged to convey to Mr. Cruger the income arising from the personal estate, to the extent of one-half of the net income of her whole estate, real and personal, and no more.

It was settled in the case of *Jaques v. The Methodist Episcopal Church*, (17 *John. Rep.* 548,) that a feme covert having a separate estate subject to her own disposal, may give it to her husband as well as to any other person, if her disposition of it be *free* and not the result of *flattery* or *force*, or improper treatment. The remaining questions in this case are whether the conveyance by Mrs. Cruger was made under circumstances which bring it within the rule laid down in that case.

Cruger v. Cruger.

These are questions principally of fact, depending upon a great mass of evidence which the parties have thought proper to spread before our judicial tribunals, and measurably before the public. Much of the evidence is irrelevant, and its examination and consideration have thrown an unnecessary burthen upon the court. I have perused the whole of it, and after much consideration have come substantially to the same conclusions with the vice chancellor. The able exposition of the circumstances, made by that learned judge, saves me the necessity of stating any thing more than the conclusions which I have adopted.

It is certainly favorable to the instrument in question that it contained a *reasonable* disposition of the income of Mrs. Cruger's estate. She retained enough to satisfy all her real wants, and to ensure to her all the enjoyments and comforts of life, so far as they depend upon property. If she had more it might have either enabled her to procure a greater quantity of luxuries, or to add to an estate already sufficiently large. It could not have been considered an abuse of her power, to devote a portion of her income, what she could certainly conveniently spare, to promote the welfare and advance the interests of one whom she had solemnly promised to love, honor and obey.

Mr. Cruger seems to have supposed, at first, that his wife should have given him, irrevocably, the control and disposal of her whole income. This impression may have been created, or at any rate was strengthened, by his construction of the order given in his favor shortly after his marriage. But in this he was clearly wrong. All the property was originally hers, and she had a right, and might well have considered it a duty which she owed to herself, to retain for herself and at her own disposal, sufficient to insure to her the necessities and comforts of life, free from the power and responsibilities of her husband. But whatever may have been his sentiments at the time of his marriage, and for some time afterwards, he eventually adopted an opinion which was, I think, under the circumstances, far from being unreasonable. He thought that it would be derogatory to him, and deservedly lessen him in the esteem of his fel-

Cruger v. Cruger.

low men, to be entirely dependent upon his wife even for his means of subsistence, during their joint lives, and to be liable to be left destitute at her death, should he survive her, and possibly when an old man, of all that might render life comfortable, and become the most miserable of paupers—one who had been habituated to luxurious living, and been reduced in his old age to penury and want. He preferred to all this, to pursue an honorable profession which he had adopted before his marriage, and to support himself in a manner suited to his own circumstances; and as they would not enable him to maintain a style correspondent with the income of his wife, he offered to share his more moderate means with her. In all this I think he was right; and if he endeavored by his own reasoning and the persuasion of her friends to prevail upon his wife to coincide with him in these sentiments and to act accordingly, I cannot see that he was wrong in his endeavors, or that she acted unwisely in yielding to them. If by the term “free,” as used in *Jaques v. The Methodist Episcopal Church*, it is meant that the act of the wife should be spontaneous, the conveyance in question would not come within the principle laid down in that case. So far from adopting that instrument through the unaided impulses of her own mind, she evidently acted in opposition to sentiments which she had long cherished. But I conceive that the disposition of her income was free, within the principle, if she eventually acted through the deliberate convictions of her own mind; whether produced by her own reflections, or the suggestions and advice of her friends.

The deed was not obtained by the flattery of the husband. His expressions of regard for his wife and respect for her character were strong, but evinced nothing beyond the feelings and sentiments which a good husband should entertain for his wife. Nothing like force is alleged. Indeed it is very evident that Mrs. Cruger would never have yielded to compulsion, physical or moral. She evidently yielded, at the time when she executed the conveyance for the whole of her income, to a momentary vexation caused probably by what she considered as the importunities of her friends. But she took immediate and strong

Cruger v. Cruger.

measures to coerce the cancellation of that instrument, and succeeded. The deed for half her income seems to have been the result of her deliberations in her calmer moments.

It does not appear that Mr. Cruger resorted to *his* personal friends to induce his wife to make any disposition in his favor. He said in his letter to Mr. Bard, of August 6, 1836, that he was opposed to the selection of any of his friends or relatives to effect a settlement of his difficulties with Mrs. Cruger. Mr. Monroe says that Cruger always expressed his willingness to leave the whole to Mrs. Cruger and *her* friends. Mr. Monroe and Mr. Whetten, both of whom have been censured for their interference, swear that they were not selected by Cruger, nor requested by him to act in his behalf. Mr. Bard was the only relative of Cruger who gave any advice to Mrs. Cruger to make any settlement in his favor. The conduct of that gentleman was highly honorable throughout; and it is creditable to Mr. Cruger to have selected so worthy a man to settle their family difficulties.

Mrs. Cruger seems to have supposed that some of her nearest relatives preferred the interests of her husband to her own; but I can see no sufficient reason for the supposition. Her sister, Mrs. Monroe, who strongly advised, and was principally instrumental in effecting the settlement, says in her letter of August 6, 1836, "I cannot say half I feel, only, dear sister, remember you are always placed right in the middle of my heart." These are strong expressions, but the conduct of this lady, notwithstanding their subsequent disputes, evinces that they were sincere. Mr. Monroe exhibits much of the vivacity of the soldier. He was occasionally angry with his sister-in-law for not following his advice, or for some hasty expression of hers, but soon recovered his equanimity, and gave her very good, and I have no doubt sincere, advice. Mr. Whetten seems to have deservedly enjoyed much of Mrs. Cruger's confidence; but he became dissatisfied when the award made by him and his associates, and their disinterested advice, were totally disregarded. All of these friends, and others, counselled Mrs. Cruger to make the settlement in question upon her husband. She was eventually induced, and I think solely by the advice of her friends, to adopt

Cruger v. Cruger.

that course. If she afterwards distrusted them for giving her advice to act contrary to her own opinions, that would not impeach the transaction, nor affect the validity of the conveyance. It is certainly a circumstance in favor of the deed of November, 1841, that it was drawn by Mrs. Cruger's counsel, and delivered through his hands. This gentleman enjoyed so much of her confidence that he was selected by her as her friend to act with Mr. Bard in settling difficulties with her husband. From the high character ascribed to him by the counsel for both parties, (I need scarcely say much to my own gratification,) it cannot be supposed that he would aid in effecting an unreasonable settlement.

The deed in question seems to me to be reasonable in its terms. It was the result of an arrangement made through the advice of Mrs. Cruger's nearest relatives and friends; was drawn by her counsel; was executed pursuant to what appeared to be her convictions of right at the time; and was acknowledged by her to be her free act and deed, without any fear or compulsion of her husband. And there was no fraud or imposition practised upon her by him, or with his knowledge, or by his procurement, or at all. There is nothing in the case which calls upon us to set it aside.

It will, I think, be proper to charge Mr. Cruger with the interest on the loans to his relatives, whether received or not. They were doubtless made at his suggestion, and as favors to him, although they received the assent of his wife. If they are well secured he will not be the sufferer; if otherwise it is reasonable that the loss of the income should fall upon him. The decree of the vice chancellor must be modified so far as to make it correspond with the views which I have expressed. In other respects it must be substantially affirmed. We shall not award costs against either party.

OSWEGO GENERAL TERM, May, 1848. *Pratt, Gridley,
and Allen, Justices.*

BUSH vs. PETTIBONE.

n order to justify a sheriff in discharging a prisoner in pursuance of an order of a judge, made for that purpose, the subject matter of the order must appear to be within the jurisdiction of the judge; and it must be the precise order which the statute authorized him to make.

n such case if the order is regular on its face, and such as the judge has power to grant, for the guidance of the sheriff, the latter may justify by the order alone; without showing that all the preliminary steps prescribed by law, to give jurisdiction, had been taken.

But where the officer claims to justify by the order alone, it should in itself cover the whole ground, and show enough to constitute a complete defence.

Under the provisions of the act to organize the state lunatic asylum, &c. passed April 7, 1842, a judge has no power to grant an order directing a sheriff to discharge a prisoner from imprisonment, on the ground of his being insane. He can only direct such prisoner to be sent to the lunatic asylum.

THIS was an action of debt brought against the defendant, as sheriff of the county of Cayuga, for the escape of one Norris King, from the custody of said sheriff, while under arrest by virtue of a writ of ca. sa. in the hands of the sheriff, in favor of the plaintiff, against said King. The defendant justified under an order made by the first judge of Cayuga county, discharging the said King from imprisonment, under the provisions of an act passed in April, 1842, to organize the state lunatic asylum. The issue was tried at the Cayuga circuit in March, 1847, before the Hon. B. WHITING, late circuit judge. The plaintiff, on the trial, proved the recovery of the judgment; the issuing of the ca. sa.; the arrest of King by the defendant as sheriff; and the escape. The defendant proved the signature of Joseph L. Richardson, and that he was first judge of the county of Cayuga, and offered to read in evidence the following paper writing or order signed by said Richardson.

"SUPREME COURT. *Norris King v. Isaac Bush.*

Application having been made to me, Joseph L. Richardson, first judge of Cayuga county, on the 6th day of June instant, by

Bush v. Pettibone.

Nelson King of Sempronius in said county, alleging that Norris King, the plaintiff in the above entitled suit, was imprisoned in the common jail of the said county of Cayuga, in the custody of the sheriff of the said county, by virtue of a writ of *capias ad satisfaciendum* issued out of the said supreme court, upon a judgment recovered therein against the said Norris King in the above entitled cause, and alleging that the said Norris King had become and was insane and praying for an examination into the mental state and condition of the said Norris King, under the provisions of the act entitled an act to organize the state lunatic asylum, and more effectually to provide for the care, maintenance and recovery of the insane, passed April 7, 1842, and having thereupon made an order appointing David Dimon and Lansing Briggs, two respectable physicians residing in Auburn in said county, to examine the said Norris King with respect to his alleged insanity, and having in said order directed the said physicians to appear before me at my office in Auburn on the 8th day of June, 1846, at 8 o'clock in the forenoon, to certify under oath their opinions respectively in relation thereto, and having also directed notice to be given to the said Isaac Bush that an examination would be had before me at the time and place last aforesaid, into the mental state and condition of the said Norris King, and it being made to appear to me by the affidavit of the said Nelson King, that the notice so directed to be given, together with a copy of the aforesaid order, was on the said 6th day of June instant personally served on the said Isaac Bush by the said Nelson King, and the said David Dimon and Lansing Briggs having this day appeared before me in pursuance of the aforesaid order, and certified under oath that they have carefully examined into the mental state and condition of the said Norris King, and particularly in reference to his alleged insanity, and in their opinion the said Norris King is insane, and being satisfied from the examination and certificate of the said David Dimon and Lansing Briggs, that the said Norris King is insane, and the said Isaac Bush not appearing to oppose his discharge; therefore in pursuance of the provisions of the act entitled an act to organize the state lunatic

Bush v. Pettibone.

asylum and more effectually to provide for the care, maintenance and recovery of the insane, passed April 7, 1842, I do hereby order that the said Norris King be discharged from his imprisonment.

J. L. RICHARDSON."

The plaintiff objected to the reading of said writing as evidence, on the ground that it was void for the several reasons appearing on its face; it not conforming to the provisions of the statute referred to in it, passed April 7, 1842. 1st. That said paper writing only showed that the first judge called *two respectable physicians*, and that it did not show that he called two respectable physicians, and other *credible witnesses*; or that *he invited the district attorney to aid in the examination*, according to the provisions of sections 32 and 33 of said act. 2d. That said paper writing showed that the first judge discharged the said Norris King from imprisonment; and did not show that he *ordered him into safe custody and to be sent to the asylum*. 3d. That said act being a jurisdictional act, the order and the proceedings on which it was founded should strictly comply with all the provisions and requirements of the act, in order to render it valid. The said objections were overruled by the circuit judge, and it was decided by him that said order was a justification to the sheriff for the escape; to which ruling and decision the plaintiff excepted. The writing was then read in evidence on the part of the defendant, and the service on the defendant proved. The defendant released King from imprisonment, and King so released, went away with his son. The circuit judge charged the jury that said writing was a justification to the defendant, as sheriff, for the escape of King. To which charge the plaintiff excepted, for the reasons urged against the admission of said paper writing as evidence. The jury found a verdict for the defendant. And the plaintiff made a bill of exceptions, and moved for a new trial.

W. H. Jewett, for the plaintiff.

P. G. Clark, for the defendant.

Bush v. Pettibone.

By the Court, PRATT, P. J. The only defence interposed to this action by the sheriff, was the order of Judge Richardson. No preliminary proof was adduced to show that the prisoner was insane, or, in the language of the statute, that he appeared to be so. In order to justify the defendant in discharging the prisoner, the subject matter of the order must appear to be within the jurisdiction of the officer granting it, and it must be the precise order which the statute authorized him to make. In such case, if the order, on its face, is such as the officer from whom it emanates has power to grant, for the guidance of another officer, the latter may justify by the order alone, without showing that all the preliminary steps prescribed by law to give jurisdiction, had been taken. (*Bennett v. Burch*, 1 *Denio*, 146.) It rests upon the principle that process regular on its face, is alone sufficient to justify the officer executing it. (*Savacool v. Boughton*, 5 *Wendell*, 170.) But to have this effect the order must be regular on its face—such as the officer making it was empowered to grant.

The insanity of the debtor, alone, would constitute no defence to an action for an escape; and the object of the statute under which these proceedings were had, is not merely to discharge the debtor from imprisonment, but rather to provide for his conveyance to, and confinement in the state lunatic asylum. (*Laws of 1842*, p. 141.) The main object is the debtor's restoration to reason; and his discharge from imprisonment is but incidental to the accomplishment of that object. If the order therefore had simply directed him to be sent to the asylum, perhaps it might have been a justification, but nothing appears in the order, or elsewhere, showing that the proceedings before the judge were instituted with that view, or resulted in the attainment of that object. For aught that appears in the order they were instituted simply for the purpose, on the part of the young man, of procuring his father's discharge from imprisonment, or for the purpose of taking him home and endeavoring to cure him there. The law allows a discharge from imprisonment for no such purpose. If the debtor was to be taken from the custody of the sheriff, it must be for the purpose of send-

Tallman v. Varick.

ing him directly to the asylum, in order that his recovery from insanity might be effected as soon as possible. The plaintiff had a right to a strict observance of the law; as the same act gives him a right to re-arrest the debtor as soon as he recovers. As the object of the imprisonment is to compel payment of the debt, and as payment could hardly be expected from the imprisonment of an insane man, the act may be considered as passed as well for the creditors as for the insane debtor. If the party may be discharged from imprisonment without any direction for his safe keeping, he might, on his recovery, if he ever recovered, be beyond the jurisdiction of the court, and the reach of the plaintiff's process. This could not have been the intention of the act. It is insisted on the part of the defendant, that we are to presume that further directions were given in relation to the safe keeping and removal of the lunatic to the asylum. But as the defendant claims to justify by the order alone, it should in itself cover the whole ground, and show enough to constitute a complete defence. (12 *Mass. Rep.* 319.) A new trial must therefore be granted.

OSWEGO SPECIAL TERM, October, 1848. *Pratt*, Justice.

TALLMAN and others vs. VARICK and others.

Where the lands against which the decree in an original suit is attempted to be enforced have been transferred to persons who were not parties to the original suit, that suit can only be revived by an original bill in the nature of a supplemental bill of revivor; and is therefore subject to all the defences appertaining to original bills.

The defendants in such a suit have a right to set up, by way of answer, and to insist upon, any defence to the relief prayed for which may exist, in the case.

A bill to carry into execution a decree abated by the death of the defendant therein, is a species of *scire facias*; and a court of equity, in such cases, will follow the analogies furnished by the rules of courts of law. Hence if the lands against which the decree is sought to be enforced were conveyed by the defen-

Tallman v. Varick.

dant in the decree before the decree was docketed against him, so that it was never a lien upon the lands, the court will not enforce the decree against them.

But the defendants in such bill are bound to interpose and assert their defence by answer; or they will be forever estopped.

IN EQUITY. The object of the bill in this cause was to revive a decree obtained in the court of chancery, in the year 1840, by the American Life Insurance and Trust Company against Abraham Varick and others, in a foreclosure suit, and to have execution for the deficiency remaining due and uncollected, upon a sale of the premises under the decree. The bill alleged that on the 6th of July, 1842, the American Life Insurance and Trust Company made an assignment of all its property and effects, claims and demands, including the bond and mortgage of Varick and the decree obtained thereon, to the plaintiffs, together with one Anthony Barclay, who declined the trust; and that the plaintiffs took upon themselves the execution thereof. That Varick died on the 20th of March, 1842, intestate, and without leaving any personal property; that no administrator had been appointed; and that Richard Varick, Maria A. Varick, and Julia C. Varick were his heirs at law; to whom no lands or premises had descended, to the knowledge of the plaintiffs. That at the time of filing the bill the several defendants were in the possession of certain lands and premises formerly belonging to Varick, on which the said decree was a lien on and after the 23d of December, 1840. And the plaintiffs claimed that they were entitled to the same relief against the defendants as they were against Varick, in his lifetime; and prayed that the suit might be revived, and the decree be carried into effect against the defendants; and that execution might be awarded against the lands and premises for the balance due upon the decree, with interest and costs. The facts set up in the answers of the defendants are stated in the opinion of the court.

Murray Hoffman & C. P. Kirkland, for the plaintiffs.

Tallman v. Varick.

C. A. Mann, Levi Beardsley, N. Hill, Jun. & H. Denio, for the defendants.

PRATT, J. The bill was filed in this cause for the purpose of reviving a decree recovered against Abraham Varick in his lifetime, and of having execution of the same against the lands upon which the decree was alleged to be a lien at the time it was docketed, and which are now in the possession of the defendants. The defendants by answer insisted that the decree never was a lien upon the lands described in the bill; and stated that they held the lands through a deed of assignment, made for the benefit of creditors, by Abraham Varick, in the year 1838, and some two years before the docketing of the decree in question. They also set up, in their answer, that the assignees, Charles A. Mann and James Platt, after the docketing of the decree, filed their bill in the court of chancery, against the creditors of Varick, including the complainant in said decree, for the purpose of establishing the trusts in said assignment, and of carrying them into execution under the direction of the court. And that afterwards, and before the filing of this bill, a decree was made establishing such trusts, and directing the said Mann and Platt to execute the same. To this answer a general replication was filed.

On the trial the plaintiffs proved the decree in favor of the American Life Insurance and Trust Company, an assignment of the same to the plaintiffs, and that it had been docketed in the county of Oswego where the land is situated, and rested. The defendants proved the assignment to Mann and Platt, the enrolled decree establishing the trusts therein, and that the defendants held under such assignment.

Under this state of facts the plaintiffs' counsel insisted that they were entitled to a decree reviving the original decree without prejudice to the rights of the defendants; that it was not competent for them to set up by way of answer any defence to the bill; that although it was necessary to make them parties, yet that was a mere formality, and a decree against them would not affect their rights; and that if they had any valid objection

Tallman v. Varick.

to the enforcing of the decree against the lands in their possession, they must wait until an attempt was made to sell the lands, and then defend any action which might be brought to dispossess them.

These propositions were so utterly opposed to the entire principles of equity jurisprudence, that it struck me with surprise to hear them asserted by counsel who have justly attained a high reputation for their extensive knowledge in that department of law; and I apprehended that I must have overlooked some important exceptions to the general rules which obtain in such cases. But after a careful examination of the cases and authorities cited I have found no reason to change my first impressions in relation to the subject.

The bill in this case, if true, shows a very clear case on the part of the plaintiffs for the interposition of the equitable powers of the court, to enable them to obtain the benefit of the original decree, and to enforce the lien which they obtained by docketing the decree against the lands which belonged to Varick at the time of such docketing. And the answers, upon the face of them, would seem to be perfectly fit and proper for putting fairly in issue the defences which the occupants of the lands described in the bill claim to have against enforcing the decree upon these lands. I am unable to perceive any good reason why the defences may not be interposed at this stage of the litigation; nay, why the defendants are not compelled to interpose them now, or be forever barred. The idea that they may set them up hereafter is contrary to the whole genius of equity jurisdiction. It is said to be the constant aim of courts of equity to do complete justice by deciding and settling the rights of all persons interested in the subject matter of the litigation, so that the performance of the decree may be safe for those who are the subjects of its mandate, and that future litigation may be prevented. Hence the maxim, that "Courts of equity delight to do justice, and that not by halves." (*Story's Eq. Pl.* § 72. *Mif.* 163, 164.) I can see no reason, therefore, why this case should form an exception to the general rule.

The cases cited by the counsel for the plaintiffs were cases

Tallman v. Varick.

of bills of revivor simply; and in such cases, as a general rule, the only question that can arise is as to the right of the party to revive. And it was formerly held that an objection to the right to revive could only be taken by plea or demurrer. (2 *Sim.* 465. 5 *Id.* 286. 1 *Hoff. Ch. Pr.* 379, 382.) But the late authorities hold that the objection may be set up in the answer. (*Mitf.* 290. 3 *Dan. Ch. Pr.* 1711. *Story's Eq. Pl.* 829.) But it is obvious that the defences to a simple bill of revivor are very limited. This bill is proper only in cases where a suit abates by death, and the interest of the person whose death has caused the abatement is transmitted to that representative which the law gives, or ascertains; thus raising simply a question of character or identity. (3 *Dan. Ch. Pr.* 1696, 1718. *Story's Eq. Pl.* 364.) The defence in such cases, therefore, would only go to the character of the party by or against whom the suit is sought to be revived; and all other matters would be left to be disposed of in the original suit after it had been revived. But when the interest has been transferred by the act of one of the parties, as in this case by assignment, the suit must be continued by an original bill in the nature of a bill of revivor. In this case, the lands against which the decree in the original suit is attempted to be enforced having been transferred to persons who were not parties to the original suit, that suit can only be revived by an original bill in the nature of a supplemental bill and bill of revivor; and is therefore subject to all the defences appertaining to original bills. (*Story*, 439. *Dan. Pr.* 1721, 1723. 2 *Barb. Ch. Pr.* 83.) Indeed the defendants would not be bound by the decree itself, but would be authorized to attack it. (*Att'y Gen. v. Foster*, 7 *Jurist*, 188; *S. C.* 2 *Hare*, 81. 13 *Sim.* 282.) It follows, therefore, that the defendants have a right to set up, by way of answer, and to insist upon, any defence to the relief prayed for which may exist in the case.

There is another view to be taken, equally conclusive against the plaintiffs. This is a bill for carrying into execution a decree abated by the death of the defendants therein. It is therefore a species of *scire facias*. Indeed formerly it was the practice,

Tallman v. Varick.

when a suit abated after the decree was enrolled, to revive it by a subpoena in the nature of a scire facias, upon the return of which the party to whom it was directed might insist that he was not bound by the decree, or show any reason why it should not be enforced against him ; and if he succeeded he was dismissed with costs. (*Story's Eq. Pl.* 366. *Mitf.* 67, 70.) It is a common maxim that equity follows the law ; *equitas sequitur legem* ; (1 *Story's Eq.* 4 ;) that in dealing with cases of an equitable nature courts of equity follow the analogies furnished by the rules of law ; hence the counsel contended on the argument that terretenants in a case of scire facias at law could not plead that the judgment was no lien upon the lands in question, and that they would not be bound by the judgment. Neither of these propositions is tenable. If the judgment is not in fact a lien upon the lands described in the scire facias, or if the terretenants hold by a title anterior to the recovery of the judgment, it should be pleaded to the action. (*Comyn's Dig. pl.* 3, l. 14.) So the heirs may plead *riens per descent*. (*Id.* 3, l. 13. 4 *Hill*, 24.) And if the terretenants fail to plead, and let judgment pass against them in the action, they are forever estopped. This was expressly adjudged in *Thompson v. Hammond*, (1 *Edw. Ch. Rep.* 497.) See also *Whiting v. Tenants of Crosby*, (3 *John.* 87 ; 16 *Id.* 579.) If therefore we follow the analogies furnished by the rules and precedents of courts of law, the defendants in this case were bound to interpose and assert their defence at this stage of the litigation, or lose their right to defend.

The lands described in the scire facias having been conveyed by Varick, before the decree was docketed against him, it never was a lien upon these lands, and the decree cannot be enforced against them. No objection was taken to the assignment. It could not under the general replication, be attacked for fraud. Besides, the suit of Mann and Platt would bar the plaintiffs, who hold under the Life Insurance and Trust Company, which was made a party to that suit, from attacking the assignment for such cause. The bill must therefore be dismissed with costs.

ONONDAGA GENERAL TERM, November, 1848. *Pratt, Gridley, and Allen, Justices.*

BORT vs. SMITH.

The admission, in a justice's court, of incompetent testimony, to establish a fact clearly proved by other testimony, of a competent character, is not such an error as requires the county court, on certiorari, to reverse the judgment of the justice.

A county court has authority, on certiorari to a justice, to look into the testimony, and see if it supports the judgment; and when there is an entire failure of testimony, the court will reverse the judgment.

In this respect it is governed by the same rules which guide the supreme court on an application to set aside a verdict, or a report of referees, upon a case.

ERROR to the Herkimer county court. The action was trover, brought in a justice's court by Bort against Smith, for a quantity of grain. On the trial before the justice the plaintiff proved by Jonas Rice that the defendant occupied a farm in the town of Danube, which farm was occupied by the plaintiff in 1845. That the plaintiff hired the farm of Daniel Smith, 2d. That in the spring of 1846 the witness was called on to appraise the personal property that the plaintiff sold to Daniel Smith, 2d. There was but one piece of rye and one piece of wheat on the farm. That after the other property was appraised the parties had some talk about the wheat and rye. Daniel Smith, 2d, was to harvest the wheat and rye, and thresh it, and deliver one-half of it to the plaintiff. The grain was not appraised. After the plaintiff left the farm the defendant occupied it. Smith took the property appraised, at the appraisal. John Dillenback, another witness, testified that he was one of the appraisers. That the premises were in the possession of the plaintiff, at the time, and the wheat and rye belonged to him. Amos Gage testified to a demand of the wheat and rye, made by the plaintiff of the defendant, in the fall of 1846. The defendant said he had made away with the grain, and his father would back him up in it. This witness also testified to a conversation with Daniel Smith, 2d, after the execution

Bort v. Smith.

of the bills of sale of the personal property, in which Smith told him that he had got through with the plaintiff, all except the grain on the ground; that as to that they could not agree on the price, and he, Smith, had not bought it. Smith said he was to harvest it and thresh the grain, and deliver one-half to the plaintiff. Abraham Cramer, another witness for the plaintiff, testified as to the quantity of the grain, and its value, &c. He was asked if he had "a conversation with Daniel Smith, 2d, in regard to the grain in question?" This question was objected to by the defendant's counsel, on the ground that Smith was in court, and might be called. The objection was overruled by the justice, and the witness testified to two conversations between him and Smith, in which he said he was to harvest and thresh the grain and deliver one-half of it to the plaintiff. Some other testimony was introduced, which it is unnecessary to refer to. The justice rendered a judgment in favor of the plaintiff, for \$20,50 damages and \$7,99 costs; which judgment was reversed by the county court, on certiorari, and the plaintiff brought his writ of error.

C. Tracy, for the plaintiff in error.

H. Link, for the defendant in error.

By the Court, PRATT, P. J. There is nothing in the return of the justice in this cause which shows the relation that the defendant in the suit before him sustained to Daniel Smith, 2d, and therefore the evidence of his declarations was clearly inadmissible. Had the evidence shown that he was the defendant's vendor, it would not have been competent. (*Hurd v. West*, 7 Cowen, 759. 8 Wend. 490. 1 Hill, 612. 7 Id. 361.)

The question then arises whether the admission, in a justice's court, of incompetent testimony, to establish a fact clearly proved by other testimony, of a competent character, is such an error as requires the county court, on certiorari, to reverse the judgment of the justice.

Bort v. Smith.

It is quite clear that the return of the justice is not to be treated as a bill of exceptions. It partakes more of the nature of a case to set aside a verdict or report of referees. And in such cases, the whole case is to be examined, and if the court can see that substantial justice has been done, notwithstanding the alleged error, they will not interfere. (12 *Wend.* 41, 64. 8 *Id.* 672. 4 *Id.* 458.) The county court has authority to look into the testimony and see if it supports the judgment; and when there is an entire failure of testimony the court will reverse. And in this respect it will be governed by the same rules which govern this court on an application to set aside a verdict, or a report of referees upon a case. (2 *Hill*, 125. 18 *Wend.* 142. 15 *Id.* 490.) It would therefore seem to follow that the court should be governed by the same rules, in relation to errors in admitting or rejecting testimony. Besides, the county court are required by the statute to give judgment as the right of the case may appear, without regarding technical defects in the proceedings before the justice, which do not affect the merits. (2 *R. S.* 257, § 181. 18 *Wend.* 142.) I am inclined to the opinion that this provision of the statute has been too often over looked or disregarded in reviewing proceedings in justices' courts. It is seldom that this class of officers are men learned in the law, yet they are a very useful class of public officers, and have important duties to perform in the adjustment of difficulties, which arise between citizens of their neighborhood; and hence when substantial justice has been done, not only the statute but the best interests of the community require that their judgments should not be reversed for defects purely technical.

When an erroneous decision has been made by the justice, the presumption undoubtedly is that the party against whom such decision was made has been injured; but when it appears affirmatively that the judgment must have been the same had no such decision been made, the error should be disregarded. The true rule, we apprehend, is this. When the fact in dispute is so clearly proved by competent testimony that the county court would have been legally bound, had no improper testimony been admitted, to reverse a judgment adverse to such

Moulton v. Norton.

proof, then a judgment in accordance with such proof ought not to be reversed, although improper testimony may have been admitted. Such is clearly the rule which this court has adapted upon a case to set aside a verdict or report of referees. (12 *Wend.* 41. 4 *Id.* 456. 10 *Id.* 338. See also 1 *Taunton*, 12; 6 *Bing.* 561; 9 *Pick.* 176; 1 *Wash. R.* 6.)

In this case the fact which was attempted to be proved by the declarations of Daniel Smith, was very clearly established by other competent testimony which was uncontradicted. His declaration had also been proved by one witness without objection. Had the testimony objected to been excluded, and had the justice, on the remaining proof, given judgment for the defendant, the county court would have been authorized to reverse the same. We are therefore of the opinion that the Herkimer county court erred in reversing the judgment of the justice. And the judgment of the county court must be reversed.

SAME TERM. *Before the same Justices.*

MOULTON and others vs. NORTON.

On the 26th of February, 1842, C. and N. entered into an agreement, under seal, by which C. agreed to sell to N. his farm, for \$6000, \$375 of which was to be paid by the 1st of April, 1843. Of this latter sum, \$200 was to be paid by the 1st day of June, 1842, but if not paid by that time, N. was to give his note for the amount. If C. should receive \$375 from N. and the latter should choose to quit the premises, he was to be at liberty to do so, at the expiration of the year ending on the 1st of April, 1843, by paying said \$375 to C. N. was to leave the dwelling house and two barns, with the farm, and the use of two stoves, and to have the stoves if he kept the place. And in case he built a fence he was to be paid for it out of the rent of the place, if he quit the premises. N. also agreed to inform C., by the middle of July, 1842, whether he kept the place according to the agreement, or not. *Held* that the agreement was a contract for the sale and purchase of the premises, and was not a lease thereof, so as to authorize a distress for rent.

Moulton v. Norton.

Held also, that the provision giving N. the right to quit the premises at the end of the year, upon the payment of the \$375 only amounted to a refusal of the farm to N. for one year, upon a forfeiture of the first payment; with a stipulation on his part to give notice, by the middle of July, if he should elect not to keep the premises.

An affidavit of the amount of rent due, annexed to a distress warrant, which purports to give the legal effect of a contract between the parties, without setting it out in *hæc verba* should, if it is claimed that the contract amounts to a demise, allege that fact.

It is not sufficient to set out a conditional contract, and an election by the tenant to lease, without alleging any specific demise, or agreement by which rent was reserved.

An officer, in making a distress for rent, under a landlord's warrant, does not act in the capacity of a public officer, but as a private bailiff of the landlord; and the landlord is, in effect, the distrainer.

A sheriff, therefore, is not responsible for the acts of his deputies, in serving distress warrants.

The legislature, in making it necessary that distresses should be made by certain public officers, did not intend to change the entire responsibility growing out of those proceedings, and with it the form of pleadings in actions to recover the property, but simply to narrow the circle of selection of the agents to be employed by the landlord.

An officer in justifying the taking of property under a distress warrant, for rent, is obliged to go back of his warrant, and show an actual demise, and rent due.

A joint action cannot be maintained against a sheriff and his deputy, for the acts of the deputy.

ERROR to the Oneida common pleas. Norton sued Moulton, Lewis and Carter, in the court below, in an action of trespass for taking a quantity of grain, hay, a span of horses, a cow and other property, and carrying away and converting the same. The defendants severally pleaded the general issue, and gave notice that the property was taken under and by virtue of a distress warrant issued by Carter, as landlord of certain premises before that time leased to Norton, which warrant was directed to the sheriff of the county of Oneida, or any one of his deputies, &c. directing and requiring them to distrain the goods and chattels of Norton liable to distress, for the sum of \$200, the amount of rent claimed to be due and payable from him to Carter on the 1st of June, 1842, on and towards the rent of the premises for one year, commencing on the 1st of April, 1842, and terminating on the 1st of April, 1843; the

Moulton v. Norton.

whole rent of the premises, for the year, being \$375. That such distress warrant was delivered to, and was executed by, the defendant Lewis, a deputy sheriff of the county of Oneida; and that the defendant Moulton was sheriff of said county. That Carter was the owner in fee of the demised premises, and that Norton was in the occupation thereof, as his tenant, at the time of the seizure of the property; that such property was seized as a distress for rent, and was not removed at the time of such seizure; that the said sum of \$200 had been made by a sale of a portion of such goods and chattels, that the residue of the goods not sold were not removed from the demised premises, but were returned to Norton; that the said goods were appraised and sold in all respects according to law; that the \$200 so due for rent had not been otherwise paid; and that the surplus moneys arising from such distress and sale had been paid by Lewis, the deputy sheriff, to Norton, and the same was accepted by him. The defendants also set out in their notice what they claimed to be a *lease* of the premises in question, from Carter to Norton, upon which, as they insisted, the rent distrained for, had accrued. It was in these words:

“Agreement made this 28th day of February, 1842, between Guy Carter, jun. of the town of Paris, of the first part, and Dennis Norton, of said town, of the second part, witnesseth, that the said party of the first part agrees to sell his farm known as the Nelton farm, containing one hundred and eighty acres of land in the town above mentioned, for six thousand dollars, to be paid as follows: three hundred and seventy-five dollars to be paid by the first of April, 1843, and two hundred dollars of the above is to be paid by the first day of June, 1842, but if not paid by that time the said party of the second part is to give his note on demand for the sum of two hundred dollars, and the remainder at the time first specified, if the party of the first part receives three hundred and seventy-five dollars from the party of the second part, and the party of the second part chooses to quit the premises he can do so at the expiration of the year, ending on the first day of April, 1843, by paying over said sum to the party of the first part. Said Norton is to

Moulton v. Norton.

have the dwelling house and two barns with the farm, and the use of two stoves, and the stoves if he keeps the place, and the necessary fire wood for one family ; said Norton is also to have the use of two ploughs, one cart and a sled and drag also to use on said farm ; said Norton is to have from Carter what hay he wants to use during his spring work, by leaving half as much in the barn another winter for him, said Carter, in payment for the same. Mr. Norton is to take possession April, 1842. Said Norton is to have of said Carter what seed grain Carter has to spare, for sowing and to feed, &c.; and if said Norton keeps the place Carter is to have all the wood that is cut from the stump at the present time, and for the compensation for straightening a certain line. Carter is to pay Norton three shillings per cord for cutting and cording three foot wood, and four cents apiece for cutting the saw logs twelve feet long, and by the side of said wood lot ; if Norton builds a fence he is to be paid for it, if he quits the premises, out of the rent of the place ; Carter is to wait for the seed grain until the first day of October, 1842, without interest ; said Norton is to inform said Carter by the middle of July, 1842, whether he keeps the place according to the above arrangement or not.

In witness whereof, we have hereunto set our hands and seals this 28th day of February, 1842.

GUY CARTER, Jr. [L. S.] .

DENNIS NORTON. [L. S.]” .

That Norton entered and took possession of said premises by virtue of said contract, and continued to occupy the same up to the time of the seizing, taking, driving and carrying away the said goods and chattels. That Norton informed Carter, in pursuance of the said contract and agreement, that he should not keep the place, and elected to rent the same ; that two hundred dollars of the rent became due and payable on the first day of June, 1842, and the remaining one hundred and seventy-five dollars at the expiration of the year ending on the first day of April, 1843 ; that said rent of two hundred dollars remained due and unpaid on the fifteenth day of November, 1842, and that Carter thereupon issued under his hand and

Moulton v. Norton.

seal a warrant of distress for the collection of such rent. That the following affidavit was annexed to the distress warrant:

"State of New-York, Oneida County, ss.

Guy Carter, junior, of the town of Paris, in the county of Oneida, the landlord for whose benefit the distress mentioned in the annexed warrant of distress is to be made, being duly sworn, deposeth and saith, that he, this deponent, and one Dennis Norton, entered into a contract on or about the 28th day of February, in the year of our Lord one thousand eight hundred and forty-two, to sell his farm known as the Welton farm, containing one hundred and eighty-three acres of land in the town of Paris above mentioned, for six thousand dollars, and three hundred and seventy-five dollars of which was to be paid by the first day of April, 1843, two hundred of which was to be paid by the first day of June, 1842, but if not paid by that time the said Dennis was to give his note on demand for the sum of two hundred dollars, and the remainder at the time first specified, and if the party of the first part, this deponent, received three hundred and seventy-five dollars from said Dennis, and the party of the second part, said Dennis, chose to quit the premises, he might do so at the expiration of the year ending on the first day of April, 1843, by paying over said sum to this deponent; and said Norton was to have the dwelling house and two barns with the farm, and the use of two stoves, and the stoves if he kept the farm, and the use of two ploughs, one cart, sled and drag to use on said farm, and said Norton was to have from said Carter what hay he wanted to use during his spring work, by leaving half as much in the barn another winter for him, said Carter, in payment for the same; said Norton was to take possession the first day of April, 1842, and said Norton if he builds a fence by the side of a certain wood lot specified in said contract, is to be paid for it out of the rent of the place if he, said Norton, quits the premises; and the said Norton was to inform the said Carter by the middle of July, 1842, whether he should keep the place according to the arrangement made or not; and this deponent further saith that said Norton entered into the possession of said place pur-

Moulton v. Norton.

suant to said contract, and made his election not to purchase said farm as aforesaid, and informed this deponent of the same, and said Norton elected to rent said place for three hundred and seventy-five dollars for one year, two hundred dollars of which was payable on the first day of June last, and one hundred and seventy-five dollars was payable on the first of April next, the year to commence on the first day of April, 1842, and terminate on the first day of April, 1843; that the said two hundred dollars is due towards one year's rent of said place commencing on the first day of April, 1842, and terminating the first day of April, 1843; that the said two hundred dollars became due and payable on said year's rent of said place to said Guy Carter, junior, on the first day of June last, and is now due and payable; that no note has been given for said rent and same remains due and payable as above except the building of a certain fence by said Norton, which he will be entitled to have deducted from the residue of the rents next spring if he quits the premises; and this deponent further saith that the sum of two hundred dollars is due as aforesaid for the rent of said place as aforesaid, and that the premises in this affidavit and in the annexed warrant of distress mentioned are the same; and further this deponent saith not."

On the trial in the common pleas the taking of the property was proved, and the value thereof; and the defendants introduced the agreement between the parties, and the distress warrant, and proved the execution thereof; and they established most of the facts set forth in their notice. The jury found a verdict in favor of the plaintiff, against all the defendants, and assessed his damages at \$352,90. And the defendants brought their writ of error.

J. Ruger, for the plaintiffs in error.

Th. H. Flandreau, for the defendant in error.

By the Court, PRATT, P. J. The contract under which the plaintiff below entered into the possession of the premises in

Moulton v. Norton.

question, was clearly a contract to purchase, and not a demise. There is no part of it which assumes to demise, or reserve rent. It is somewhat informal and unfinished, but as far as we are able to make any thing out of it, it has all the essential ingredients of a contract to purchase. It assumes to sell the premises for a given consideration, a time for the payment of a portion of such consideration is specified, and although no time is mentioned for the payment of the residue, that is evidently an unintentional omission.

The only question that can arise in relation to the construction of the contract, grows out of that part of it which gives Norton the right to quit the premises at the end of the year, upon the payment of three hundred and seventy-five dollars, specified in the contract as the first payment. That, we think, only amounts to a refusal to Norton, for one year, upon a forfeiture of the first payment; with a stipulation on his part, to give notice by the middle of July, if he should elect not to keep the premises. There is no stipulation, in case Norton should elect not to keep the premises, that the contract shall be deemed a demise, or that the three hundred and seventy-five dollars shall be deemed rent reserved. The word rent is only once used in the contract, and then in a connection which, at most, leaves it very doubtful what was really intended by it. It would be giving that word altogether too much potency to hold that, notwithstanding the careless manner of using the term, it has the effect to entirely change the purport of the contract.

It was insisted, upon the argument, that at all events, after the middle of July, and after Norton elected not to keep the premises, he held as tenant, and not as purchaser. If that were so, it would not alter the case. It is quite clear that up to that time he held as purchaser; and it was during that time, that the two hundred dollars, the sum for which the warrant of distress was issued, became due. That sum, therefore, accrued as purchase money, and not as rent; and Carter was bound by the agreement to take Norton's note for the same. How the mere change of the relation on the fifteenth of July from vendor and purchaser to that of landlord and tenant, should

Moulton v. Norton.

convert a debt due on the first of June previously, into rent reserved, with the right to collect the same by distress and sale, is more than I can comprehend. It would, in my opinion, require some express stipulation between the parties to convert a contract of that character into a demise *ab initio*, with all the rights growing out of that relation. Even where a party enters into the possession of land under an agreement to lease at a given rent, it has been held that the landlord cannot distrain for non-payment; that there must be an actual demise. (*Hogan v. Johnson*, 2 Taunton, 148. *Dunk v. Hunter*, 5 B. & A. 322.)

I think the affidavit is also defective. It sets out the contract, and an election to lease, but it does not set out any specific demise or agreement by which rent was reserved. It purports to give the legal effect of the contract, and not to set it out, in *hæc verba*. It should therefore, if it is claimed that the contract amounted to a demise, have alleged that fact. (5 Hill, 562.)

We are therefore of opinion that the proceedings were neither a justification to the party nor the officer. (*Sackett v. Barnum*, 22 Wend. 605.)

The question in relation to the lialility of Moulton is not free from doubt. At common law, the landlord might distrain in person, or issue his warrant to any private person. By the laws of 1813, (1 R. L. 434, § 5,) after five days' notice of the distress, if the goods were not replevied the person distraining with the sheriff or under sheriff of the county, or with the constable or other officer of the town or place where such distress should be taken, (who were thereby required to be aiding and assisting therein,) should cause the goods and chattels to be appraised. The officer was to summon and swear the appraisers, and the overplus, after sale, was to be left in the officer's hands. By the revised statutes, (2 R. S. 500, § 3,) "every distress must be made by the sheriff, or one of his deputies, or by a constable or marshal of the city or town, who shall conduct the proceedings throughout." This makes it obligatory upon the party to call in the aid of the officer at the very commencement of the pro-

Moulton v. Norton.

ceedings; and the reason for the change, given by the revisers, is that "by the act of 1813, these officers were called in at the appraisement, and that there seemed to be stronger reasons to require the protection of a disinterested officer, at the commencement of what is usually a severe proceeding." (*Revisers' Notes*, 3 R. S. 762, 2d ed.) The question then arises under this statute, whether the officer, in making the distress, acts in the capacity of a public officer or as a private bailiff of the landlord; whether the legislature, in making it necessary that the distress should be made by certain specified public officers, meant to change the entire responsibility growing out of these proceedings, and with it, of course, the whole form of pleadings in actions to recover the property; or to simply narrow the circle of selection of the agents to be employed by the landlord. In *Webber v. Shearman*, (6 Hill, 29,) this question was decided in the supreme court. In that case, the question arose upon the pleadings, but the point was necessarily involved in the decision. Justice Cowen, in giving the opinion of the court, held that the officer acted merely as bailiff of the landlord, and that the landlord was in effect the distrainer. This decision seems to conflict with the opinion of Justice Bronson in the case of *Van Rensselaer v. Quackenbush*, (17 Wend. 35.) It was there said that the landlord could not maintain an action against a third person who should, after distress, convert the goods; that the distress could only be made by a public officer; and that after distress the goods, like those taken under execution, were in the custody of the law, and the officer alone could have an action for their conversion. This decision was not necessary in the case, and was probably made without a very strict examination of the provisions of that statute. We think, therefore, that the construction of that statute given in the case of *Webber v. Shearman* is the correct one.

As it was observed in that case, at common law the landlord distrained in person, or by any agent he might see fit to employ, although in practice it was usual to employ an officer who was familiar with that kind of business, as it is now to employ officers to make sales under personal mortgages. The

Moulton v. Norton.

revised laws which provided for calling in the aid of an officer at the appraisal, treats the landlord as the party conducting the proceedings, and the officer as simply aiding and assisting him. The revised statutes change the law in regard to the time of procuring the aid of an officer, and make it necessary to employ the officer at the commencement of the proceedings; but otherwise the landlord is spoken of as the responsible party. Section first gives the *landlord* the right to distrain. By section 11, the *landlord*, in certain cases, is to provide a place for storing the goods distrained. By section 12, he is authorized to distrain cattle or stock feeding upon any common appurtenant; and section 28 provides that where the rent is justly due any irregularity by the *party* or his *agent*, distraining, shall not render the distress unlawful. As the proceedings are to be conducted throughout by the officer, any irregularity must be the immediate act of such officer. Yet in this section it is treated as the act of the party himself, or his agent. The landlord, therefore, throughout the statute in question, is spoken of and treated as the responsible and acting party, and the officer as simply aiding and assisting him.

Again; it is provided that the warrant of distress shall be served by the *sheriff*, or *one of his deputies*. If the warrant is to be deemed process, in the ordinary sense of the term, and issued to the sheriff in his official character, it would not have been necessary to mention his deputies as persons who might serve it. They would be entitled to serve it by virtue of their office. Again; if it is process, the officer would be protected whenever the warrant was regular on its face, and accompanied by a regular affidavit. Yet the late supreme court, in the case of *Webber v. Shearman*, decided, and we think correctly, that the officer, in a suit against him, would be compelled to go back of his warrant and show an actual demise, and rent due; that in pleading to a declaration in replevin he should avow as formerly, in the name of the landlord, and make cognizance as his bailiff. If, therefore, we are right in this view of the case, the officer acts in such cases merely as bailiff of the landlord, and not as a public officer in the execution of legal process, and

Moulton v. Norton.

the sheriff therefore is not responsible for the acts of his deputies in serving distress warrants.

A sheriff is not answerable for any default of his deputies, unless it be a default in executing the power lawfully derived from the authority of the sheriff, under which the deputy acts. When he undertakes any duties not resulting from the duties of his office the sheriff is not responsible. (*Allen on Sheriffs*, 86, and cases cited. 4 *Mass. Rep.* 60. 7 *Id.* 123.) He ought not to be held responsible for the acts of the deputy, unless his redress against him and his sureties be clear and unquestionable. (7 *Cowen*, 746.) It follows, therefore, that the sheriff in this case ought not to have been made a party.

There is another point, which was not discussed upon the argument, but which I am inclined to think is equally fatal to the case of the defendant in error. Although the sheriff is liable for the acts of his deputies in certain cases, and the party aggrieved has his action against the sheriff or his deputy at his election, yet I apprehend he is not entitled to maintain a joint action against them. This point has not, to my knowledge, been decided in this state; but in the case of *Phelps v. Campbell*, (1 *Pick.* 62,) it was expressly decided that the sheriff and his deputy, in such cases, were not jointly liable. And the reasons given for the decision in that case, I think, are founded on correct legal principles. (See *Cowen & Hill's Notes*, 823; 13 *Mass. Rep.* 49; *Allen on Sheriffs*, 88.)

The decision of the court below being wrong as to the defendant, Moulton and the judgment being entire, it must be reversed as to all the defendants. (5 *Hill*, 441. 1 *Denio*, 527.)

Judgment reversed.

OTSEGO SPECIAL TERM, December, 1848. *Pratt*, Justice.

BAILEY *vs.* DEAN.

A bill of discovery in aid of an action at law must disclose a case which would entitle the plaintiff to recover in such action. And the plaintiff must state and set out so much of the pleadings as will enable the court of equity to see that the facts alleged in the bill, and of which he claims a discovery, are material. To support an action for slander of title, special damages must be alleged, and that too, circumstantially. An allegation of loss, in general terms, is not sufficient.

To sustain an action for slander of title, or for malicious prosecution, there must be a want of probable cause. If what the defendant says, or does, is in pursuance of a claim of title, he is not responsible.

No proceeding according to the regular course of justice will make a complaint, or other act, amount to a libel, for which an action can be maintained.

A distress warrant is a remedy given to the party by law, for the purpose of enforcing a legal right, and comes within the reason of this rule.

A bill of discovery, in aid of a suit at law, cannot be sustained if the evidence sought for, when obtained, would be inadmissible upon the trial of the action at law.

It is a general rule that a defendant is not bound to discover any thing which might render him liable to a penalty or forfeiture, or to any thing in the nature of a penalty or forfeiture. *Per PRATT, J.*

An action for slander, is in the nature of a penal action, and comes within this general rule, *it seems.* *Per PRATT, J.*

IN EQUITY. This was a bill for a discovery in aid of the prosecution of a suit at law commenced by Bailey against Dean for slander of title, libels, malicious prosecution, &c. The bill set forth a great number of usurious transactions between Bailey and Dean, extending over a period of nearly twenty years. It alleged that on the 1st of December, 1836, Bailey applied to Dean for a further loan of \$160 for one year; that Dean claimed that there was \$555 due to him from Bailey, upon two judgments which he had recovered against Bailey; though Bailey denied that there was any thing due, in fact. That Dean finally proposed to loan Bailey \$160 if he and his brother Charles Bailey would execute a bond and a mortgage on the farm of the former for \$1080, payable in ten years, with interest, to consist of the \$555, two colts at \$150, cash \$160,

Bailey v. Dean.

and \$215 extra interest and usury. That the Baileys at first refused to accept the loan on those terms, but they at last consented, and started for Cooperstown to execute the bond and mortgage. That while they were on their way Dean stated to Bailey that he did not take a mortgage in the usual way, but that it was his custom to take a deed, absolute on its face, and give back a lease reserving an annual rent, equal to the interest, with a defeasance, &c.; because he would not have to pay taxes on leases. And Dean agreed that if they would give a deed it should be the same as a mortgage, on their paying the \$1080 and interest, and if that sum was not due, that he would deduct or refund the overplus, &c. That on these terms a deed and lease were executed by the parties. That Bailey did not know that there was nothing due upon the judgments, at the time of executing the deed, and did not ascertain that fact until he employed counsel in 1846. The plaintiff alleged that the deed was fraudulent, usurious, and void, and obtained by Dean falsely, fraudulently, wilfully, &c. That when the deed and lease were executed, it was so late that the parties agreed to postpone the execution of the defeasance until some other day; Dean agreeing to execute it on request, and that all the writings should be considered as one instrument. That Charles Bailey was named in the lease as lessee, and the lease was afterwards assigned by him to the plaintiff John Bailey, with Dean's consent. The defeasance, it appeared from the bill, was subsequently executed. The bill alleged that on the 18th of July, 1844, Dean fraudulently, maliciously, oppressively and extortionately issued a distress warrant on the said mortgage to collect the interest on the said debt of \$1080, when in truth it was not a deed and lease but a mortgage; that such mortgage, deed and lease, and debt were fraudulent, usurious and void, and the Baileys were not indebted to Dean, for rent or otherwise. That the distress warrant was also fraudulent and void; that it was issued against the property of John Bailey (although the name of Charles Bailey was, by mistake or fraud, inserted in said warrant,) and was levied on John Bailey's property; which was

Bailey v. Dean.

sold for \$162,93. That by means of said warrant and sale, and by means of Dean's claiming to be the absolute owner of the said farm, and claiming a sum of \$2000 as his due on said judgments and lease, John Bailey, the plaintiff, was ruined in character and property, and lost his farm and property by means of Dean's libels and slander of title to said farm, and of his credit, and by means of said distress warrant; and that the plaintiff had sustained damages to the amount of several thousand dollars, as stated in the said suit at law against Dean, and for which injuries and damages such suit at law was brought. The bill alleged that there was a mutual account between the plaintiff and Dean, extending back to 1832, which had never been settled, and which Dean fraudulently refused to settle, claiming a balance of \$2000 and interest due to him. And that he has claimed to be the absolute owner of the premises, in fee, since January, 1844. That all these fraudulent and usurious transactions occurred within Dean's own personal knowledge; and that for his said acts of libel, slander, &c. the plaintiff had commenced his suit at law; and reference was made to the declaration on file therein; said suit being at issue. That Dean had put in a plea claiming to be the owner of the premises, by virtue of the deed executed by the plaintiff, and that said deed, lease, and defeasance were not a mortgage. That the plaintiff will be under the necessity of proving that they were all one instrument, and were given to secure said debt of \$1080. That he had applied to Dean for a voluntary discovery, &c. but he fraudulently refused to make the same. That those facts are necessary to aid said suit at law. And the bill prayed for an answer and discovery on oath, &c.

To this bill the defendant demurred.

L. C. Saxton, for the plaintiff.

Lathrop & Burditt, for the defendant.

PRATT, J. If the plaintiff has made a case by his bill which would have entitled him to a discovery of the usury, by the de-

Bailey v. Dean.

fendant, previous to the passage of the act allowing a party in a suit to call his antagonist as a witness, he is not, by force of that law, deprived of the right to such discovery. The party called as a witness under that act has the same privileges as any other suitor; and therefore would not be compelled to disclose any fact which would tend to criminate him, or subject him to an indictment. The defendant in this case, if called as a witness in the suit at law, would not be bound to disclose the fact that he had taken usury. Upon this bill of discovery, however, he is compelled by the statute of 1837 to make such disclosure, if the fact exists.

But I think this bill cannot be sustained upon the merits. A bill of discovery in aid of an action at law must disclose a case which would entitle the plaintiff to recover in such action. And the plaintiff must state and set out so much of the pleadings as will enable this court to see that the facts alleged in the bill, and of which he claims a discovery, are material. (*Story's Eq. Pl.* 319, 324, 558, 559. *Mitf. Pl.* 187. *Hare on Disc.* 43. 3 *John. Ch.* 47. 9 *Paige*, 622.)

This bill entirely fails in that respect. 1st. It does not show with sufficient clearness the nature of the action. The declaration in the suit at law is not attached to the bill, and forms no part of it; and for the purposes of the decision of the case on the demurrer it cannot be taken into consideration. The bill itself merely mentions the fact of a suit for certain libels, slander, malicious prosecution, and wrongs having been brought, but it does not specify the particular wrongs for which it is brought. It is altogether too uncertain. (*Story's Eq.* §§ 317, 318.) 2dly. It does not set forth a sufficient cause of action, were there no objection to the form. The only act set forth in the bill which might tend to lay the foundation of an action for slander of title or malicious prosecution against the defendant, was the issuing of the distress warrant on the 18th of July, 1844. To support an action for slander of title special damages must be alleged, and that too circumstantially. (*Starkie on Slander*, 158, 159, 323.) This bill discloses no treaty for the sale of the premises, broken off by means of the slander, nor any circum-

Bailey v. Dean.

stances from which this court may infer a loss; but it merely alleges a loss in general terms, which is not sufficient. (*Id. ib.*) Again; to sustain an action for slander of title, or for malicious prosecution, there must be a want of probable cause. In that respect I think they should be put very nearly upon the same ground. If what the defendant says or does is in pursuance of a claim of title, he is not responsible. It would be a monstrous doctrine to assert that the party who brings his action of ejectment claiming title to the land may be sued in an action of slander if it should turn out that he was mistaken. In such cases malice, which is the gist of the action, is conclusively disproved. Hence it was anciently held that an action would not lie against a person for claiming title in himself although he knew the claim was false. (*Starkie*, 202. 4 *Coke*, 18.) But the later cases have somewhat modified that doctrine.

But if there be some ground for the claim, the cases all agree that the action cannot be sustained provided the assertion is in pursuance of such claim. (*Starkie on Slander*, 202, 203, 4, 5, 46. *Smith v. Spooner*. 3 *Taunt.* 248. 2 *Greenl. Ev.* § 428. 4 *Burr.* 2422. 4 *Co.* 18.) In this case the bill shows that the defendant held an absolute deed of the premises; that the plaintiff occupied the premises by virtue of a lease from the defendant to Charles Bailey, reserving rent, and stipulating for enforcing the payment thereof by distress. It also alleges that by virtue of said deed and lease the defendant claimed title and a right to distrain; that under such circumstances the defendant issued a distress warrant; and for that the action of slander of title and malicious prosecution is brought against him. To sustain this action the defendant is required to discover his dealings with the plaintiff for a period a little less than twenty years, in order, if possible, to overthrow the apparent title. The bare statement of the case would be sufficient. The plaintiff, upon the trial, if he stated no more than is stated in this bill, would be nonsuited, upon his opening. But there is another view of this case which is decisive of it, so far as the action at law is based upon the idea of slander of title. The only allegation in regard to that matter set forth in the bill is the distress warrant. It

Bailey v. Dean.

is well settled that no proceeding according to the regular course of justice will make a complaint or other proceeding amount to a libel, for which an action can be maintained. (*Starkie*, 186. 1 *Saund.* 131.) A distress warrant, although not issued for the purpose of instituting a suit, is a proceeding given to the party by law, for the purpose of enforcing a legal right, and comes directly within the reason of the rule. It is now regulated by statute, and can only be served by a public officer. In such cases, if it issued without right, the law gives ample redress without subjecting a party to the pains and penalties of an action of slander. 3dly. The evidence, when obtained, would be inadmissible upon the trial of the action at law; and for that reason the demurrer should be allowed. (*Story's Eq. Pl.* 558, 9, 565, 319. *Mitf.* 187. *Hare on Disc.* 43. 1 *Bligh's Rep. N. S.* 96, 120. 9 *Paige*, 622, 580.)

The bill shows that the defendant, as long ago as 1836, received from the plaintiff an absolute conveyance of the premises, and at the same time executed a lease in perpetuity to Charles Bailey, reserving to himself the yearly rent of \$75,60, with the privilege, in default of payment, of distraining for the same. Thus stands the paper title, except that this lease has been assigned, by consent of the defendant, to the plaintiff.

It is well settled that usury in the consideration does not invalidate an absolute deed or conveyance of land. (2 *Hill*, 524. 1 *John. Cas.* 158. 7 *Paige*, 615.) This seemed to be conceded by the plaintiff's counsel; and hence, in the bill, he insists that there was, at the time of the execution of the deed and lease, some parol agreement or understanding by which the deed and lease were given merely as a mortgage for securing the payment of some \$1080. He insists that by proving a parol defeasance he can change the deed into a mortgage, and then attack and demolish it for the usury which it contains, and thus leave the plaintiff with a title so clear that the man holding the deed which he terms a mortgage may be mulcted in damages in an action for slander for disputing it. However the rule may be in equity (and it seems to be a mooted question there) it has been settled since the case of *Webb v. Rice*, (6 *Hill*,

Bailey v. Dean.

219,) that in an action at law a parol defeasance cannot be shown for the purpose of turning a conveyance of land absolute upon its face into a mortgage. '

It was insisted upon the argument, that this case being in a court of equity, the rule would not apply. But the plaintiff requires the discovery, not to be used in a court of equity, but in a court of law. Upon the trial of the action at law the evidence will not have any more efficacy from the fact that it has been fished up through the aid and assistance of the equitable powers of the court, than if the proof was offered by a witness upon the stand. We cannot but see that if all the facts stated in the bill were admitted as true they would not avail the plaintiff in the trial of his action, or enable him to avoid the justification which the defendant has spread upon the record. Upon these points a court of equity has a right to pass judgment where a discovery is sought. (*Story's Eq. Pl.* § 558.) It was claimed that the contract executed some years subsequent to the deed should operate as a defeasance. But that is a simple contract for the sale of the defendant's interest, and does not purport to relate back to, or affect, the execution of the deed.

There are other minor objections to this bill which it is not necessary to notice. Those above stated are sufficient.

I do not believe, notwithstanding what was said by the chancellor in *March v. Davis*, (9 *Paige*, 580,) that a party should be compelled to disclose facts to enable a plaintiff to sustain an action of slander. The general rule is that a defendant is not bound to discover any thing which might render him liable to a penalty or forfeiture, or any thing in the nature of a penalty or forfeiture. It has often been held that actions of slander were of the nature of penal actions. Hence, on motions for new trials the same rules have been held to be applicable to both. (3 *John.* 180. 9 *Id.* 36. 2 *Burr.* 66. 4 *Cow.* 37. *Salk.* 644.) The jury, in giving their verdict, are not confined to the actual damage sustained, but may take into consideration the motives of the defendant, and the degree of malice with which he was actuated, and regulate their verdict with a view to its effect upon the community and as a punish-

Bailey v. Dean.

ment of the defendant. So far as these considerations affect the verdict, it loses its compensatory character and becomes strictly penal. (3 *John.* 56. 3 *Wils.* 18. 2 *Id.* 206,) And when the defendant may be indicted for the same offence, the fact that he has been indicted and has satisfied the penalty of the law cannot be shown for the purpose of avoiding or mitigating the penal character of the verdict in the civil suit; although the criminal court may stay judgment, or regulate the penalty to be imposed, by considerations growing out of the civil suit. (6 *Hill*, 468.) The action, therefore, is in the nature of a penal action, and comes within the general rule.

Nor does it seem necessary that a discovery for the purpose of procuring evidence to sustain an action of slander should be allowed. From the nature of the case the right to a discovery could not be mutual. If the slander consists in accusing a person of crime, the plaintiff, if called upon to make discovery of the truth of the charge, to enable the opposite party to defend the suit, would be allowed to decline answering, on the ground that it would criminate himself.

Again; the very principle on which the suit is based precludes the idea of any necessity for a discovery. It is founded on the idea of publication—of having spread abroad the slanderous charge. If the defendant has not spread abroad the report so that there is sufficient evidence of the publication without calling upon the defendant himself, the plaintiff's character, as a general rule, will not suffer materially. But this point it is not necessary to decide. The demurrer must be allowed.

ONEIDA GENERAL TERM, January, 1849. *Pratt, Gridley,
and Allen, Justices.*

CRAFTS vs. MOTT.

The claim of a surety against his principal, before payment of the debt by the former, is contingent, and is in terms provided for by the bankrupt act. On payment, by the surety, his claim becomes absolute. It is then a *debt*, and the relation of principal and surety no longer exists.

Such debt is provable under a commission of bankruptcy against the former principal, and will be barred by his certificate.

Where A. agrees with B. to pay and satisfy a bond and mortgage given by them jointly, payable in instalments at future periods, and to save B. harmless therefrom, the equitable relation between the parties is that of principal and surety. And the claim of B. against A., under the contract to indemnify, is, within the terms as well as the spirit and design of the bankrupt act, provable against the estate of A., as a contingent claim, to be allowed when it shall become absolute; and will be discharged by A.'s certificate in bankruptcy.

MOTION by the plaintiff to set aside the report of a referee. The action was debt on an agreement under seal, brought in this court to recover money paid by the plaintiff to the defendant. The declaration was in the ordinary form in debt on the contract, adding the money counts. The plea was the general issue of *nil debet* with a special plea to the whole declaration, setting up the defendant's discharge under the bankrupt act, on the 6th of July, 1843; his petition having been presented on the 27th of January, 1843. The plaintiff replied, admitting the discharge, but alleging that the cause of action accrued after the presentation of the defendant's petition in bankruptcy. The cause, by stipulation between the parties, was referred to Hiram Denio, Esq. of the city of Utica, to hear and determine and report thereon to this court. On the hearing before the referee the execution and delivery of the bond set forth in the declaration was admitted by the counsel for the defendant, and the same was read in evidence, and is in the words and figures following, viz.: "Whereas Willard Crafts and S. Germond Mott did, on the fourth day of March, 1836, purchase of Alexander B. Johnson of the city of Utica, thirteen lots lying in the city of Utica, on and near Steuben-street, for the sum of thir-

Crafts v. Mott.

teen hundred dollars, and did on the same day give unto the said Johnson a bond and mortgage on said lots for the said sum of thirteen hundred dollars, to be paid in eight equal annual instalments, with interest annually on the whole sum. And whereas the said Willard Crafts has sold and conveyed to said Mott his equal undivided half of said lots, and the said Mott is to pay off and satisfy said mortgage and bond to said Johnson. Now therefore I the said Germond Mott do hereby covenant, promise and agree to and with said Crafts, that I will satisfy and discharge said bond and mortgage, and save said Crafts, his heirs and assigns, harmless from all damages, costs and charges which he may sustain on account of said bond and mortgage, and that I will indemnify him from all payments due or to grow due thereon, and from all the consequences that may accrue to him on account of said bond and mortgage. Given under my hand and seal, this 19th day of April, 1837.

S. GERMOND MOTT." [L. s.]

The plaintiff proved by Alexander B. Johnson, the person mentioned in the above bond, and to whom the bond and mortgage was given for the said thirteen lots, that Crafts, the plaintiff in this suit, had paid him various sums on said bond and mortgage, for principal and interest, at the times particularly stated by him ; some of the payments having been made before, and some after, the presentation of the defendant's petition. The plaintiff claimed to recover from the defendant the several sums of money paid by him, and interest thereon from the time he paid the money to Johnson ; and especially on all sums which he had paid since said Mott petitioned for the benefit of said act, on the ground that the discharge only operated upon such debts as the defendant owed at the time of presenting his petition, and that this debt, or that part of it which accrued to the plaintiff after the filing of the petition, was not discharged by the operation of the bankrupt act, because the plaintiff could not come in under the commission and prove his debt ; for the reason that he had not paid it. But the referee decided that the whole bond was discharged by the

Crafts v. Mott.

operation of the bankrupt act, and reported that there was nothing due the plaintiff.

W. Crafts, plaintiff, in person. A discharge under the bankrupt act only operates upon debts which existed at the time of presenting the petition. (2 *Denio*, 73. 6 *Hill*, 250, 254.) The plaintiff in this case does not belong to that class of creditors mentioned in the fifth section of the bankrupt act. There was no debt due the plaintiff until he paid the money for the defendant. He could not prove his debt, because he had none at that time. This is not a bond with a penalty. It is only an agreement to indemnify. The contingent or uncertain demands provided for in the act of congress, are those contingent demands which were in existence as such, and in such a condition that their value could be estimated at the time when the party was decreed to be a bankrupt. (*Ex parte Barker*, 9 *Ves.* 110. 17 *Id.* 503. *Taylor v. Young*, 3 *Barn. & Ald.* 521. *Woodard v. Herbert*, 24 *Maine Rep.* 358. *Cook's Bankrupt Law*, 141. 1 *John. Cas.* 73. *Lansing v. Prendergast*, 9 *John. R.* 127. *Smith v. Gordon*, 6 *Law Reporter*, 313, 317. *Boyd v. Vanderkemp*, 1 *Barb. Ch. Rep.* 274. *McMullen v. Bank of Penn.* 2 *Barr's Penn. Rep.* 343. *Rosevelt v. Marks*, 6 *John. Ch. Rep.* 266, 284. 1 *Cowp.* 525. *Taylor v. Mills*, 3 *Wilson*, 262. *Smith v. Gale*, 7 *T. R.* 360. 2 *Bos. & Pul.* 1. 2 *Black. Rep.* 794. *Stinemets v. Ainslie*, 4 *Denio*, 573.)

Wm. Curtis Noyes, for the defendant. I. The plaintiff, under the contract declared on, stood only in the relation of surety for the defendant as to the bond and mortgage; and as the defendant's liability on the bond and mortgage to Johnson was discharged under the bankrupt act, and this being the principal debt, and in fact provable in the proceedings in bankruptcy, the defendant could not be made liable for any subsequent payments by the plaintiff. The principal debt being discharged, all the incidents were discharged with it. Both the obligors to Johnson were originally bound for the whole

Crafts v. Mott.

debt; by the bankrupt proceedings and discharge the joint liability was severed—the plaintiff alone remaining liable; and any payments made by him afterwards were for his own debt, and on his account. If the debt, as to the principal creditor, was extinguished, as it clearly was, it is difficult to conceive how the defendant could be made liable, under the circumstances of the case. Besides, as to Johnson, he could have proved, and is presumed to have proved, his debt under the bankrupt proceedings, and to have received a dividend. II. The discharge was a complete bar to the plaintiff's claim for the instalments accruing subsequent to the presentation of the petition. Under the contract the claim was provable; the language of the bankrupt act being much broader than the old bankrupt act, and broader than any of the insolvent laws of this state, under which decisions have been had, which would seem favorable to the plaintiff's case. (*Bankrupt Act of August 19, 1841, § 5, 1st proviso.*) This very point has been considered by Vice Chancellor Sandford, (1 *Sandford's Ch. Rep.* 188,) in the case of *Morse v. Hovey*, in which he held that a claim like the present was barred by the bankrupt discharge; and his decision was affirmed on appeal to the chancellor (1 *Barb. Ch. Rep.* 406, S. C.) upon the same point. (See also *Haight v. Jackson*, 3 *Mees. & Welsb.* 598; *Jackson v. Magee*, 3 *Ad. & Ellis, N. S.* 48.) A late case in Vermont, (*Wells v. Mace*, 2 *Washburn's Vt. Rep.* 503,) has seemed to throw some doubt on this subject; but it is of no particular weight as an authority, and is reviewed and shown to be unsound, in the *Law Reporter* for December, 1848. (1 *Law Rep. N. S.* 377.) At any rate, the decisions in our own courts already referred to must prevail.

By the Court, ALLEN, J. Many of the earlier decisions of the English courts, some of which are relied upon by the plaintiff, are no longer authority as evidence of the law, either in England or in this country. In England the bankrupt acts were from time to time modified and amended so as to provide for many of the difficulties, and relieve from many of the

Crafts v. Mott.

hardships, suggested by these very decisions. And the late bankrupt act of the United States embraced most of the amendments and modifications of the English acts in relation to debts provable under the commission. By the act of 7 *Geo.* 1, debts due presently, but payable *in futuro*, were first made provable under a commission in bankruptcy; and this act was amended and its remedies extended by act of 49 *Geo.* 3. (*Eden's Bank. Law*, 125.) Prior to the act last cited the rights and remedies of persons who were security or "liable" for the bankrupt, were extremely limited. The right of such persons to prove their claims was limited to cases in which the surety was actually damnified before the bankruptcy, or when he had some counter security, as a bill, note, or bond, payable at a day certain. (*Eden's Bank. Law*, 149.) This act gave the surety, or *person liable*, the benefit of the principal creditor's proof; and secondly, if the principal had not proved, permitted such surety, or *person liable*, to prove under the commission, although he might have paid after a commission issued. (*Id.* 154.) The words "person liable," "were adopted for the convenient latitude of comprehending all those who could not strictly be considered as sureties, and yet might need the protection they were entitled to under those general words." (*Per Lord Eldon, Ex parte Yonge*, 3 *Ves. & B.* 31. *Ex parte Lobbaw*, 17 *Ves.* 334.) These several modifications of the English bankrupt acts have rendered a large class of cases wholly useless as authorities as to what debts are or are not provable under a commission in bankruptcy, and accounts for an apparent conflict of authority in the reported cases.

By the late bankrupt act of the United states, section five, it was provided that "all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, endorsers, bail, or other persons having uncertain or contingent demands, against such bankrupt shall be permitted to come in and prove such debts or claims under this act," &c.

There can be no doubt that if the plaintiff occupied the relation of a surety to the defendant in respect of the debt to

Crafts v. Mott.

Johnson, his claim was then barred by the certificate. Our act only differs from the English bankrupt acts upon this subject, in this respect, that by the latter, sureties and others having contingent claims cannot prove such claims until they shall have actually paid the same; while the United States bankrupt act gives the party the right to prove at once, reserving his right to have the same allowed until the claims shall have become absolute. (*Bankrupt Act*, § 5. 6 *Hill*, 583. *Eden's Bankrupt Law*, 150, 1.) The design of the bankrupt act, was to give the sureties the right to prove their claims against the estate of the bankrupt, and to give the bankrupt the benefit of his certificate of discharge as against all such claims; and effect cannot be given to this intent or to the language employed, unless sureties at the time of the bankruptcy are allowed to prove their claims at once and as contingent claims. The rights of the other creditors, and of the bankrupt, are abundantly protected by withholding the allowance until actual payment of the debt by the surety, or, in the words of the act, until the "debts and claims become absolute." This right of the surety to prove his contingent claim rendered it unnecessary to provide for giving him the benefit of the proof of the principal creditor, as provided by the English acts, and it was therefore omitted. The claim of a surety against the principal, before payment, is contingent, and is in terms provided for by the act. It becomes absolute on payment by the surety. It then becomes a *debt*. The relation of principal and surety no longer exists. The surety has become the creditor, and then no necessity exists for a special provision authorizing him to prove his debt. If, then, the plaintiff had been the surety for the defendant, his claim would have been barred by the certificate of discharge. (*Jackson v. Magee*, 3 *Ad. & Ellis*, N. S. 48. *Haight v. Jackson*, 3 *Mees. & Wels.* 598. *Morse v. Hovey*, 1 *Sandf. Ch. Rep.* 188. *S. C. 1 Barb. Ch. Rep.* 406.) But the benefit of the act is not confined to persons holding the technical and conventional relation of sureties, endorsers, or bail. The phrase "*other persons*," was used to reach all persons holding a similar, although not precisely and techni-

Crafts v. Mott.

cally either of those relations, but who had claims of a similar character—that is, “*uncertain or contingent*.” The plaintiff had a claim which was uncertain, and whether it would ever become a debt due and payable to *him*, depended upon a contingency yet to happen. It was just as contingent, and no more so, than if he had been the surety in name and in fact, for the defendant, holding an agreement to indemnify him; and the contingency was precisely of the same character. In truth the equitable relation between the parties was that of principal and surety. After the agreement between them upon which this action was brought, the debt to Johnson was the proper debt of the defendant; and although the plaintiff remained liable to Johnson as a principal debtor, he was in equity, as between him and the defendant, a surety for the latter. In *Wood v. Dodgson*, (2 *Maule & Selw.* 195,) where, upon a dissolution of a partnership between three partners, two of the partners assigned to the third all their share in the partnership debts, property, &c. and took from him a covenant to pay the partnership debts and indemnify them, and the covenantee afterwards became bankrupt, after which the two were obliged to pay, it was held that by the covenant the covenantee became the principal debtor, and the other two were his sureties, and therefore, when they paid the debts, they paid in his discharge, and that their claim was consequently barred by the bankruptcy and certificate of the covenantor. (See also *Ex parte Taylor*, 2 *Rose*, 175; *Ex parte Ogeley*, 3 *Ves. & B.* 133.) *Butcher v. Forman*, (6 *Hill*, 583,) recognizes and adopts the principle decided in the above cases, and holds the doctrine that the technical and conventional relation of principal and surety need not exist to bring a case within the provisions of the act. The claim of the plaintiff was within the terms, as well as the spirit and design of the bankrupt act, provable against the estate of the defendant as a contingent claim, to be allowed when it should become absolute, and was therefore discharged by the certificate. The case of *Stinemets v. Ainslie*, (4 *Denio*, 573,) was an action upon a continuing covenant for

 Sholl v. Sholl.

the payment of rents, and rests upon an entirely different principle. It does not affect the principle upon which we decide this case.

The motion to set aside the report of the referee is denied.

 SAME TERM. *Before the same Justices.*

SHOLL vs. SHOLL.

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A testator, by his will, after giving to several persons legacies of \$100 each, bequeathed to his brother J. the amount of a certain bond and mortgage, and of two promissory notes, given by J. to the testator. He then gave to J. H. O., S. B. and C. P. legacies of \$100 each, and to J. C. a legacy of \$300. The testator then made "the above legacies," excepting that portion devised to his brother J., a lien upon his real estate; which said real estate he directed his executors to sell, and from the proceeds thereof to pay "said legacies." And in case of a surplus from the sale, after paying all claims thereon, and the legacies, then he directed that "all the legacies before mentioned" should be proportionably increased, and in case of a deficiency, that then and in that case "the said legacies" should be proportionably diminished. *Held*, that by the words "all the legacies before mentioned" the testator meant all the legacies before mentioned as being liens upon, and as being entitled to be paid out of the avails of, the real estate devoted by the will to that purpose.

Held also, that so far as the testator's brother J. was concerned, the testator merely meant to forgive the debt owing by him; and that it was not the intention of the will that he should share any part of the proceeds of the sale of the real estate.

THIS was an appeal, by John Sholl, from a decree of the surrogate of the county of Herkimer. The petition of appeal alleged that Christian Sholl, late of the town of Danube, Herkimer county, made and executed in due form of law, his last will and testament, on the 4th of February, 1845, and died soon afterwards, leaving the same in force. That the will was duly proved and recorded in the office of the surrogate, as a will of real and personal property, and the executors named therein were duly qualified as such, and took upon themselves

Sholl v. Sholl.

the trust and duty of executing such will. That in April, 1848, the executors accounted, before the surrogate, in regard to their administration as executors, and that upon that accounting the sum of \$1623,98 was found to be in their hands, to be distributed among the legatees named in the will, of whom the appellant was one; and that sum was accordingly paid to the surrogate by them, to be distributed among the legatees according to law. That the appellant thereupon presented to the surrogate the will of the testator, and requested that in making a distribution of such surplus fund, the surrogate should set apart and distribute to him such proportion thereof as justly belonged to him, as one of the legatees; he claiming that his share exceeded \$500. But that the surrogate refused to distribute any part of the fund to him, but made a decree distributing such surplus as follows: To Joseph Sholl, Jacob Sholl, Nancy Getman, Delia Dillenback, Catharine Smith, Lany Smith, John H. Cook, Sarah Beekly and Catharine Putnam, \$135,33 each; and to Jacob Cook \$405,99. The appellant, by his petition, prayed that the decree of the surrogate might be reviewed by this court, and that it might be reversed, modified or amended. No evidence was introduced on the hearing before the surrogate, except the will of the testator. The persons above named as distributees of the surplus fund were made parties, respondents, and they put in an answer to the petition of appeal; insisting that the decree of the surrogate was right. Annexed to their answer was a copy of the will, which was as follows:

"First, I give and bequeath unto my brother Joseph Sholl the sum of one hundred dollars. Item: I give and bequeath to my brother Jacob Sholl, the sum of one hundred dollars. Item: I give and bequeath unto my sister Nancy Getman, widow, the like sum of one hundred dollars. Item: I give and bequeath unto Delia, wife of Peter Dillenback, the sum of one hundred dollars. Item: I give and bequeath unto my sister Lany, wife of Abraham Smith, the like sum of one hundred dollars. Item: I give and bequeath unto my brother John Sholl, the amount of a certain bond and mortgage which was executed by him and wife, to me, on the

Sholl v. Sholl.

first day of April, in the year one thousand eight hundred and thirty-six, for six hundred and fifty-six dollars; also the interest on the same. Also, I give to my brother John, the amount, together with the interest, of two notes I hold against him, the one for fifty dollars, dated September fifth, eighteen hundred and forty-three, the other for one hundred and ten dollars and nineteen cents, dated January twenty-second, eighteen hundred and forty-five. Item: I give and bequeath to my nephew, John H. Cook, the sum of one hundred dollars. Item: I give and bequeath to my nephew, Jacob Cook, the sum of three hundred dollars. Item: I give and bequeath unto my niece, Sarah, wife of Dr. Beekly, the sum of one hundred dollars. Item: I give and bequeath unto my grand-niece, Catharine Putnam, the sum of one hundred dollars. And I hereby make the above legacies, excepting that portion devised to my brother John, a lien upon my freehold estate, situate in the town of Danube, county of Herkimer aforesaid, on which I now reside; which said real estate I hereby order and direct my executors, in case my decease takes place before the first day of April, eighteen hundred and forty-seven—then within six months after said first day of April, to advertise and sell at public sale, to the highest bidder, and from the proceeds thereof within one year to pay said legacies; and in case I should survive, that then in that case, within six months I order such sale as aforesaid, and the legacies to be paid in like manner; and in case there should be a surplus from said sale, after paying all claims thereon, and the legacies, then I direct that all the legacies before mentioned, shall be proportionably increased; and if there is not sufficient to discharge the claims and legacies, then in that case the said legacies shall be proportionably diminished."

L. Ford, for the appellant. I. The legacy given by the will to John Sholl was a *pecuniary*, and not a *specific* legacy. (*Rider v. Wager*, 2 P. Wms. Rep. 330, and note. *Walton v. Walton*, 7 John. Ch. Rep. 258. *Toller's Law of Executors*, 300 to 302.) II. By a fair construction of the language of the will, when taken altogether, it is manifest that it was

Sholl v. Sholl.

the intention of the testator that John Sholl should participate in the distribution of the surplus, if any such surplus remained.

H. Denio, for the respondents. I. John Sholl, the appellant, is not, by the true construction of Christian Sholl's will, entitled in any event to share in the proceeds of the sale of the testator's real estate. (1.) The legacy to John Sholl is *specific*, and not general or pecuniary. The amount of the mortgage and notes is specified in order to designate or describe the *things*, and not as a measure of quantity. (*Preston on Legacies*, 52, 53, 60, 61. *Lord Hardwick*, in *Heath v. Perry*, 3 *Atk.* 142, 143. *Walton v. Walton*, 7 *John. Ch. Rep.* 258, 263, 264.) (2.) The testator, by excepting the bequest to the appellant from the operation of the clause making the legacies a lien upon his real estate, indicated a clear intention of excluding him from all participation in the proceeds of that estate. (*Harris v. Fly*, 7 *Paige*, 421, 425.) (3.) The language of the clause in the will, directing all the legacies to be "proportionably increased" in case there should be a surplus from the proceeds of the real estate, does not by a fair construction embrace the bequest to the appellant. The terms "all the legacies before mentioned" should be construed with reference to the general scope of the clause, which is to subject the real estate to the legacies, in exclusion of the appellant. The construction contended for by the appellant's counsel is founded on a minute verbal criticism, which should never be allowed to prevail against the general scope and probable intention of the testator. The sentence relied upon by the appellant should be read as though it was written "all the legacies before mentioned, *as being a lien on the said freehold estate.*" The word "*all*" refers to the word "*proportionably*," and should be read "*each*," to express the testator's meaning more definitely. It is certain that the same legacies which were to be "proportionably increased" in case of a surplus, were to be "proportionably diminished" in case of a deficiency; but there is no indication that the appellant was in any event to pay any part of his debt to the testator. The general scheme of the will is to for-

Sholl v. Sholl.

give the appellant the large debt which he owed the testator, and to divide the real estate among his other relatives in certain proportions. If the grammatical construction does favor the claim of the appellant, still that does not control the obvious or probable intention. (*Areson v. Areson*, 5 *Hill*, 410.) The provision for the appellant was not properly a "legacy;" or if so, legally speaking, it was not in common parlance. The testator called it a "portion." (4.) The great disproportion which the appellant's legacy—if the gift of the debt can be called a legacy—bears to the bequest to his relatives in the same degree, is a circumstance bearing strongly against the construction contended for by the appellant. II. There is no evidence of what the testator's "freehold estate in Danube" sold for, or that the surplus paid into court arose out of that sale. It may have been in whole or in part the produce of the personal property, in which the appellant has no interest.

By the Court, GRIDLEY, J. We are satisfied that the surrogate came to a right conclusion in rejecting the claim of the appellant to any share in the surplus of the proceeds of the real estate, devoted by the testator to the payment of the legacies bequeathed by him to the respondents. We will very briefly specify some of the grounds on which this opinion rests.

1. The legacies of the respondents were made a lien on the real estate in question. The testator directed the estate to be sold, and that those legacies should be paid out of its proceeds: while the legacy of the appellant was not only not made a lien on the land, but was excluded by a special exception. By the will, therefore, the land was a fund devoted to the payment of the legacies in question, to the exclusion of that bequeathed to the appellant. The testator foresaw that there might be a surplus; and also, that there might possibly be a deficiency. And he therefore provides that, in the event of a surplus, "all the legacies before mentioned" shall be proportionably increased; and in the event of a deficiency, that "the said legacies" shall be proportionably diminished. The question now arises, what legacies the testator intended to embrace in the words "all the

Sholl v. Sholl.

legacies before mentioned?" And it seems to us that the answer is very clear. He obviously meant all the legacies before mentioned, as being liens upon, and as entitled to be paid out of the avails of, the real estate, devoted by the will to this purpose. It is to be borne in mind, that the same legacies which the will authorizes to be increased, are by the same instrument directed to be diminished, should there be a deficiency in the fund. Now, it is easy to see why such a pro rata rule of deduction should be applied to those legacies which are to be paid out of the fund: but no reason can be assigned why an independent legacy, wholly unconnected with the fund, should be affected either by a deficiency or a surplus.

2. Again, it should not be overlooked, that the testator does not denominate the bequest to the appellant, a "legacy," but a "portion;" and therefore the expression "all the legacies before mentioned," cannot properly be referred to what he denominates a "portion," as its legitimate antecedent.

3. We do not regard the bequest to the appellant as a legacy, which the testator ever intended his executors to pay. And hence there was no provision in the will for its payment, either out of the proceeds of the real estate, or any other fund. The intent of the testator was to forgive the appellant the debt which was due from him. We are aware that the leaning of the courts has been in favor of construing legacies to be pecuniary, instead of specific, in order to prevent the failure of the bequest: and some cases where this rule has been enforced almost in defiance of the testator's intention, are cited by Ch. Kent, in *Walton v. Walton*, (7 *John. Ch. Rep.* 283.) In these cases, however, the court regard the testator as merely designating the fund out of which he desired his executors to pay the legacy, a hypothesis utterly inconsistent with the facts of this case, and which alone would be sufficient to exclude this legacy. None of the cases, however, have come up to this. On the contrary, two cases are cited on page 264, which would assign this legacy to the class of specific bequests: One from 4 *Vesey*, 555, where the testator bequeathed "8000 pounds," the amount of a banker's note, and the other from 9 *Vesey*, 360, where the

Sholl v. Sholl.

legacy consisted of "the sum or sums of money, which the executors receive on a note of 400 pounds." If, however, it were true that the form of words employed by the testator in this case, were such as had been held in other cases to be descriptive of a pecuniary legacy, still, such a construction would be in direct hostility to the entire context of this will. For it may well be asked, why should the testator desire his executors to pay the appellant just the amount of the principal and interest of the mortgage and note due from the appellant to him? Did he intend to collect these securities himself, or that his executors should collect them, and then pay back to the debtor, in the form of a pecuniary legacy, the exact amount of the debt and interest? Did he, in the language of the authorities, mention the mortgage and note as a fund to be collected by his executors, out of which, when collected, the legacy should be paid by them? It seems to us that an intention so absurd should not be imputed to the testator. Again, the appellant might obtain a bankrupt's or insolvent's discharge, and thus extinguish the debt due to the testator. In such an event, did the testator intend his executors to pay the amount of the debt as a legacy, notwithstanding the debt itself should be discharged? We think not. Yet such would be the consequence of holding this to be a pecuniary legacy. On the whole, we are of the opinion, that the testator merely meant to forgive the appellant's debt—and that it was not the intention of the will that he should share any part of the proceeds of the real estate in question.

The decree must be affirmed, and the proceedings remitted to the surrogate, &c. with such costs as the code prescribes.

SAME TERM. *Before the same Justices*

MOYER vs. SHOEMAKER.

The general rule is that a party who seeks to recover back money which he has paid under a void or a rescinded contract, must show that he in fact paid money. But an exception has sometimes been allowed, when something else has been received as money. *Per GRIDLEY, J.*

Where a party sells and assigns to another a perpetual lease of lands, and in part payment of the consideration agreed to be paid by the assignee, receives from him a deed of a piece of land, with covenants of warranty, *it seems* that the assignor, upon a failure of title to the land covered by the deed, cannot bring an action against the assignee to recover that part of the consideration for which the land was received in payment.

It is a general rule that where there is an open contract of warranty, the remedy of the party must be confined to that. *Per GRIDLEY, J.*

It is a universal rule that when a party seeks to recover back money paid upon a contract, on the ground that such contract is void for fraud, or that it has been rescinded, such party must restore, or offer to restore, whatever he has received under the contract; so as to put the other contracting party *in statu quo*. And in order to put the parties *in statu quo*, whatever may be valuable to the defendant must be restored to him, though it be of no value to the plaintiff.

Accordingly held, that before an action could be sustained, to recover the consideration paid for land, sold to the plaintiff by the defendant and conveyed by deed with covenants of warranty, on the ground of a failure of title, the plaintiff must execute to the defendant a reconveyance of the land, or offer to do so.

THIS was an action of assumpsit. The declaration contained the common money counts, and counts on an insimul computassent, and also counts for lands sold, and for the unexpired term of a lease sold to the defendant. There was a bill of particulars, in which the plaintiff claimed the sum of \$240, specified as the consideration of a conveyance of lands executed by the defendant to the plaintiff, on the 28th of Nov. 1846. Plea the general issue, with a notice of payment. The cause was tried at the Herkimer circuit in October, 1848, before Justice Gridley, when a verdict was rendered for the plaintiff, for \$270.08, subject to the opinion of the court on a case. The facts appear in the opinion of the court.

Moyer v. Shoemaker.

C. A. Benton, for the plaintiff.

L. Ford, for the defendant.

By the Court, GRIDLEY, J. This action was brought to recover back the purchase price alleged to have been paid for eight acres of land, under the following circumstances: On the 28th of Nov. 1846, the defendant conveyed to the plaintiff eight acres of land lying in the north half of lot No. 12, of L'Hommedieu's patent, in Herkimer county, for the consideration expressed in the deed of \$240, with the usual covenant for quiet enjoyment. On the same day the plaintiff assigned to the defendant a perpetual lease of a tract of land in another patent, for the consideration expressed in the assignment of \$1050. And it was proved that the eight acres were conveyed in part payment of the \$1050; so that, in point of fact, the \$240 was not paid in money, but to that extent the transaction was an exchange of lands. It was further proved, in support of the action, that long before the 28th of November, 1846, the entire north half of lot No. 12, in L'Hommedieu's patent, had been conveyed, a part by George Moyer to David and Peter Elwood, and a part by the defendant to William Watts, and that the grantees were in possession of the entire north half of the lot, including the eight acres, when the plaintiff purchased and received his deed.

Upon these facts, and these alone, the plaintiff seeks to recover back the consideration paid for the eight acres, under the counts for money paid, and money had and received, upon the ground that the consideration has failed, and that the contract should be decreed to be rescinded. A very learned and ingenious argument has been submitted to us, in favor of the plaintiff's right to recover; and we would be glad to find some legal ground upon which we could, consistently with the rules of law, adjudge him entitled to succeed.

We are, however, compelled to hold, that there is at least one insurmountable obstacle to the plaintiff's right to recover. There are also several grave difficulties in the way of a re-

Moyer v. Shoemaker.

tovery, before we reach the particular ground to which we referred.

I. The general rule is, that a party who seeks to recover back money which he has paid, under a void or a rescinded contract, must show that he in fact paid *money*. An exception has sometimes been allowed, where something else has been received *as* money. Here, however, there never was an independent money debt for \$240. It was a part of the original contract, that this should be, *pro tanto*, to the extent of \$240, an exchange of lands; and we cannot say but that if the entire consideration for the perpetual lease had been to be paid in cash, the price would have been less than \$1050. In other words, the price at which the lease lands were conveyed may have been enhanced, for the reason that \$240 was to be paid in an exchange of lands.

II. It is also a general rule that, while there is an open covenant of warranty, the remedy of the party must be confined to that. (14 *John*. 210. 5 *Cowen*, 195. 4 *Wend*. 267, 277. 4 *Hill*, 345. 1 *Id.* 147. 2 *Term Rep.* 100.) It is argued that inasmuch as no eviction can be proved by the plaintiff, he is remediless on his warranty. And it does seem to be settled in this state, that no action will lie on the covenant of warranty without an eviction, and that an ineffectual attempt, by action, to obtain possession, will not satisfy the condition of the covenant. (5 *Hill*, 599, and the cases there cited.) Hence it is contended, that unless a remedy exists to recover back the money paid, the party is without any means of redress. To this suggestion it may be answered, that if a party, with full knowledge of the facts that the land has been conveyed by previous deeds, and that the grantees in those deeds are in possession under an adverse title, consents to pay his money and take a deed, with a covenant that only makes the grantor liable in the event that the grantee should obtain possession, and be thereafter evicted by paramount title—there being no fraud nor mistake in the case—he has no reason to complain of the law. His misfortune is the fruit of his own imprudence and rashness. But on the contrary, if there were either *fraud*

Moyer v. Shoemaker.

or *mistake*, in relation to the material facts of the case, then it is the province of the court of chancery to grant relief by rescinding the entire contract, if the application be promptly made upon the first discovery of the fraud or mistake. In this case it should be said, there was no evidence of any fraudulent representations or concealment on the part of the defendant; and no ignorance or mistake of the plaintiff, concerning either the former deeds, the adverse possession, or the nature of the covenants inserted in his deed. But

III. We do not place our decision upon either of these grounds. There is another which is unanswerable. It is a universal rule, that when a party seeks to recover back money paid upon a contract, on the ground that it is void for fraud, or that it has been rescinded, such party must restore or offer to restore whatever he has received under the contract; so as to put the other contracting party in *statu quo*. It is well said by Justice Allen in *Rathbone v. Stocking*, (2 Barb. Sup. Court Rep. 145,) that "The action for money had and received is an equitable action, and will lie whenever the defendant has received money belonging to the plaintiff, which, according to natural justice and equity, he ought to refund and pay over. It takes the place of a bill in equity, and should be encouraged within proper limits. It should not be extended, however, to cases in which the defendant may be *deprived of any right* or be subject to any inconvenience thereby." If there be any right which the vendor has transferred, by his deed, the vendee cannot recover back the money he has paid, without restoring, or offering to restore, that right to the vendor. In 2 *Hill's Rep.* 288, 293, it is laid down that where one party is desirous of rescinding a contract by reason of the other's default, he *must rescind it in toto*, and cannot hold on to any part of the consideration which he has received. He must put the other party in *statu quo*, by an entire surrender of any thing he has obtained under the contract, or he cannot recover the consideration in an action for money had and received. So too in 3d *Greenleaf's Reports*, 30, in which case it appeared that the defendant had transferred a recognizance signed by one Proctor, in exchange for

Moyer v. Shoemaker.

goods purchased of the plaintiff, who discovering that he had been defrauded, wrote to the defendant that he would have nothing to do with the recognizance; it was held that he must return the recognizance and put the defendant in *statu quo*, before he could recover for the goods, and that giving the defendant notice was not enough. Again in *Masson v. Bovet*, (1 *Denio*, 69, 74,) the court say that a party who would disaffirm a fraudulent contract must return whatever he has received under it; that he must rescind it *in toto* or not at all. Another case in which this principle is announced is that of *Hogan v. Weyer*, (5 *Hill*, 390,) where it is laid down as an undeniable proposition, that a party seeking to avoid a contract on the ground of fraud must offer to restore that which he has received, so that the parties may be put in *statu quo*. (See also *Chit. on Cont.* 678, 752; 5 *East*, 449; 4 *Mass. Rep.* 502; 15 *Id.* 320; 4 *Denio*, 554.) From these authorities it is clear that in order to put the parties in *statu quo*, whatever may be valuable to the defendant must be restored to him, though it should be of no value to the plaintiff.

Now, upon this controlling principle applicable to the rescission of contracts, and the right to a recovery of the consideration paid upon them, it is obvious, that the plaintiff should have executed to the defendant a reconveyance, or offered to reconvey the 8 acres of land for which he has the defendant's deed with covenants of warranty. The parties are not in *statu quo* until that is done. The plaintiff still holds a deed which may be valuable to him. If the 8 acres should be vacated so that the plaintiff could get possession of the land, he could then enjoy it till he should be evicted by due course of law; and then he could recover on his covenant against the defendant. So too while he holds this deed, any title which the defendant should acquire to the premises in question, would come to the plaintiff and vest in him. Again; the reconveyance of the title would be very important to the defendant. It is probable (especially as the plaintiff has proved no fraud by misrepresentation, concealment or otherwise,) that there has been some mistake in some of the deeds by which the 8 acres

Beardslee v. Beardslee.

were previously conveyed, and that the defendant has rights either to reform those deeds and correct mistakes in them, against some other parties, which he could not enforce while the title was out of him; but which he might enforce if the plaintiff should reconvey to him and thus clothe him with all the rights, legal and equitable, which he possessed before his contract with the plaintiff. Nothing short of this can put the parties in *statu quo*; nor amount to a rescission of the contract *in toto*, without which there can be no recovery in this action. The defendant must therefore have judgment.

Judgment for the defendant.

5 324
72h 567

SAME TERM. *Before the same Justices.*

FRANCES BEARDSLEE vs. LAVINIA BEARDSLEE.

Where a testator, by his will, devised as follows: "It is my will and order that my beloved wife L. shall be *master of my estate*, both real and personal, so long as she remains my widow, subject to the payment of the different legacies out of the same hereafter mentioned to be paid;" and then followed bequests of certain legacies to the children of the testator; a devise of all the real estate the testator might die seised of, to his son J. J. B. and to his heirs and assigns forever; and a bequest unto all his children, share and share alike, of the residue of his personal estate to be divided after the widowhood of his wife should cease; and his wife was appointed sole executrix, and guardian of the testator's infant children; *Held*, that it was the intention of the testator to give his wife the use of his entire estate, (subject to the payment of the legacies,) during her widowhood; and that by consequence she took a life estate in the premises, subject to be defeated by her marriage; there being nothing in the will to control or overrule, that construction.

Where the grantor of an estate on condition enters for condition broken, the dower of the wife of the grantee falls with the estate of her husband.

Thus where, by the terms of a lease for the life of the grantor, the estate demised was *conditional*, liable to be *defeated*, and subject to a re-entry, by the non-payment of rent, the condition having been broken, and the lessor having re-entered for that cause; *Held* that the lessor became re-invested with her entire original

Beardslee v. Beardslee.

estate, free from any incumbrance of dower in favor of the widow of the lessee.

The usual allegation, at the end of a *case*, that the facts therein stated are taken subject to all legal exceptions and objections, and with liberty to turn the case into a bill of exceptions, amounts to nothing more than a statement that the case is made subject to the legal conclusions arising upon the facts contained therein. And it will not authorize a party to object, upon the hearing, to the *character* of a portion of the evidence, after he has *admitted* all the facts stated in the case, and *consented* to the introduction of the evidence, without objection.

THIS was an action of ejectment, brought by the plaintiff to recover her dower in certain lands in the county of Herkimer. The cause was tried at the Herkimer circuit in October, 1848, before Justice GRIDLEY, without a jury. On the trial, the facts in the case were admitted by the respective parties, for the purposes of this suit; and by consent of parties, under the advice of the court, a verdict was taken for the plaintiff that she recover one third part of the lands for which the suit was brought, as her dower in the same, subject to the opinion of this court upon a case containing the facts which were so admitted on the trial. The facts admitted on the trial were as follows: John Beardslee, senior, for many years previous to his death and at the time of his death, resided in the town of Manheim in Herkimer county, and at the time of making his last will and testament, hereafter mentioned, he was seised in fee and was possessed of the lands in which dower was sought to be recovered in this suit. He died on the 25th of October, 1825, seised and possessed of the lands in question, in which dower was sought to be recovered. On the 12th of August, 1825, the said John Beardslee, senior, made and executed, in due form of law to devise real estate, his last will and testament, in these words:

"Imprimis: It is my will and order, that my beloved wife Lavinia shall be master of my estate, both real and personal, so long as she remains my widow, subject to the payment of the different legacies out of the same hereinafter mentioned to be paid. Item. I give and bequeath unto my daughter Polly, the wife of Nicholas N. Van Alstyne, the sum of two hundred

Beardslee v. Beardslee.

and twenty nine dollars to be raised out of my estate, one year after my decease. I also give to the said Polly the further sum of five hundred dollars, to be paid to her one year after she has lawful issue; if she gets no lawful issue, the last bequeath of five hundred dollars to be null and void. Item. I give and bequeath unto my daughter Laura, single woman, the sum of one thousand five hundred dollars, to be raised and paid to her out of my estate in five equal annual instalments, the first instalment to be paid one year after my decease. Item. I give and bequeath unto my son Augustus Beardslee the sum of three thousand dollars, to be raised and paid to him out of my estate in six equal annual payments after my decease. Item. I give and bequeath unto my daughter Sarah, the sum of one thousand five hundred dollars, to be raised out of my estate and to be paid to her in five equal annual payments after she arrives at the age of twenty-one years. Item. I give and bequeath unto my daughter Helena Augusta, the sum of one thousand five hundred dollars, to be raised out of my estate and paid to her in five equal annual payments after she arrives at the age of twenty-one years. Item. I give and bequeath unto my son John J. Beardslee and to his heirs and assigns forever, all my real estate I may die seised of at my decease. Item. I give and bequeath unto all my children, share and share alike, the residue of my personal estate, to be divided after the widowhood of my wife ceases. And lastly, I do nominate and appoint my wife Lavinia to be guardian of my infant children and my only executrix in this my last will and testament, hereby revoking all former wills by me made."

The testator, at the time of his death, left the said will in full force, and the same was, after his death, proved as a will of real and personal property, and recorded as such in the office of the surrogate of the county of Herkimer. The testator left a widow, Lavinia Beardslee, the defendant in this suit, who had remained the widow of said testator ever since his death, and was still a widow. The said Lavinia, after the death of her husband, the testator, took possession, under the will, of all the lands of which the testator died

Beardslee v. Beardslee.

seised, embracing the lands in question in this suit, and continued in the possession and enjoyment of the same until the making of the lease or agreement hereafter stated, dated April 10, 1837. On the 10th of April, 1837, Lavinia Beardslee and John J. Beardslee made and executed a lease or agreement embracing the lands in question in this suit. By this lease, Lavinia Beardslee, "as executrix of John Beardslee, deceased," demised the farm in question to John J. Beardslee, his executors, administrators and assigns, during the life of the lessor, for the annual rent of \$200, with a clause of re-entry in case of non-payment of the rent reserved. The lease contained a reservation from the demised premises, for the use of the lessor and her family, of a suit of rooms in the east part of the dwelling house, and the east garden, with certain other privileges. It contained covenants by the lessee, for the payment of the rent reserved; and to furnish to the lessor certain specified articles of provisions annually; the keeping for a cow and ten sheep; all necessary fire wood; a carriage and horses and driver for her use; and for the payment of all taxes and assessments by the lessee. On the part of the lessor there was a covenant for quiet enjoyment. And there were mutual covenants by the parties, that no other families than their own should be allowed to occupy the dwelling house, or any part thereof; and that the lease should not be assigned by either party, without the consent of the other.

From the time of the execution of this lease or agreement on April 10, 1837, up to June 13, 1843, the said Lavinia Beardslee and John J. Beardslee occupied the lands in question according to their respective rights under the provisions of said will and lease, or agreement, and in accordance with the reservations, conditions and limitations therein expressed. In May term, 1843, of the supreme court, Lavinia Beardslee commenced an action of ejectment against John J. Beardslee, to recover possession of the lands described in the declaration in said cause, which lands embraced the lands in controversy in this suit; and a judgment by default, after filing an affidavit of the amount of rent due, was taken in said action. The record of

Beardslee v. Beardslee.

said judgment was docketed June 8, 1843, a writ of possession thereon was issued and executed June 13, 1843, and the said Lavinia Beardslee re-entered and took possession of said lands under said writ of possession by virtue of the recovery in ejectment, and had remained in possession there of up to the day of trial, claiming the same under said will. Previous to the commencement of this suit the plaintiff, by her attorney, demanded of the defendant possession of one-third part of the lands, as her dower, and the defendant refused to give such possession. John J. Beardslee mentioned in the will of said John Beardslee deceased, as the son of said testator and the devisee of the real estate, intermarried with the plaintiff in this suit November 2, 1835, and the said John and Frances Beardslee lived together as husband and wife until the 2d day of April, 1846, on which day the said John J. Beardslee departed this life. The lands in question in this suit were embraced in the lease or agreement, dated April 10, 1837, and in the recovery in ejectment against John J. Beardslee in May term, 1843. The facts above admitted were contained in a case made by the parties, and were taken subject to all legal exceptions and objections, and with liberty to either party to turn the case into a bill of exceptions or a special verdict.

L. Ford, for the plaintiff.

H. Denio & C. A. Benton, for the defendant.

By the Court, GRIDLEY, J. Several questions material to the decision of this cause, have been discussed by the counsel for the respective parties, which we will proceed to consider in their order.

I. It is claimed by the counsel for the defendant, that the defendant took, under the will of her deceased husband, a life estate, subject to be defeated by her marriage, in the real estate of which he died seised; and that his son, the deceased husband of the plaintiff, took a remainder in fee after the expi-

Beardslee v. Beardslee.

ration of the particular estate upon which it was limited. On the other hand it is insisted by the plaintiff's counsel, that the defendant took nothing under the will, and that the deceased son took a present estate of inheritance, subject only to the payment of the legacies bequeathed by the testator. If the latter construction shall prevail, then the plaintiff is entitled to recover in this action, unless she be estopped, as the defendant claims she is, by the execution of the lease hereinafter mentioned. In support of this latter position, we are referred to *Coke on Lit.* 47, b ; 12 *John.* 357 ; 12 *Wend.* 57, and 1 *Comstock's Rep.* 251, 252, 258.) Without expressing any opinion upon the question of estoppel, we are of the opinion that it was the intention of the testator to vest in the defendant an estate in the premises during the continuance of her widowhood. The clauses of the will upon the construction of which the question arises, are the following : "Imprimis : It is my will and order that my beloved wife Lavinia shall be master of my estate, both real and personal, so long as she remains my widow, subject to the payment of the different legacies out of the same hereafter mentioned to be paid." Then follow bequests of legacies to the children of the testator amounting to \$8229, after which comes the devise to John J. Beardslee in the following words : "I give and bequeath unto my son John J. Beardslee and to his heirs and assigns forever, all my real estate I may die seised of, at my decease." Then follows a bequest unto all his children, share and share alike, the residue of his personal estate to be divided after the widowhood of his wife ceases ; and lastly, he nominates his wife sole executrix of his will and guardian of his infant children.

This will, it must be confessed, is unskilfully drawn, and the meaning of the testator is not entirely free from doubt. Looking, however, to the whole will, and considering that the testator manifestly intended to dispose of his entire estate ; and bearing in mind the affection and confidence expressed in the will for his wife ; and the onerous and responsible duties which he imposed upon her, we cannot believe that he intended to leave her without any provision for herself. And yet, this is

Beardslee v. Beardslee.

the necessary conclusion, unless the first clause in the will is to be construed as conferring upon her the *estate*; that is, the *use* of his real and personal property during her widowhood. Again; we think that character and significance are given to the expression, "*master of my estate, both real and personal,*" by the words "*subject to the payment of the different legacies,*" &c. It expresses the same meaning as though he had said, "I make my beloved wife the *owner* of my estate both real and personal, during her widowhood, subject to the payment of the several legacies," &c. It is also worthy of observation, that the same clause, and the same words, are employed to describe her interest in the personal estate, as in the real. And we see that the personal estate was not to be divided until the widowhood of the defendant should cease. We therefore conclude that the intention of the testator was to give his wife the use of his entire estate, (subject to the payment of the legacies,) during her widowhood, and by consequence that she took a life estate in the premises, subject to be defeated by her marriage. There is nothing in the will to *control* or *overrule* this construction. It is true that the word "*master*" is not the most apt word, by which to designate one as the owner of an estate; but in 20 Wendell's Rep. 53, a testator directed in his will that his wife should "*have the care*" of his property so long as she remained his widow, for the maintenance of herself and the children; and that expression was held to convey an estate in the lands, by which an action for dower brought by the widow of a deceased son of the testator, who claimed under a naked devise of the fee, similar to that devised to John J. Beardslee in the will now under consideration, was barred. So too it has been held that when a testator declared one "*executor of all his lands,*" there being obligations connected with the devise, he gave an *estate in* the lands, (5 B. & AL. 785.) Again; "*the use and benefit of all my estate,*" has received a similar construction. In 25 Wendell, 633, the words "*rents and profits*" were adjudged to carry an estate in the land for life, notwithstanding a devise of the inheritance, expressed in such words as, standing alone, would have conveyed a present

Beardslee v. Beardslee.

estate in possession ; and this was so held against a daughter whose share in the inheritance was expressed without reservation, while the shares of her two sisters were given subject to the widow's right. These authorities seem to show very clearly that we are not transcending the legitimate rules of construction when we interpret this will so as to give the defendant an estate in the premises in question ; and also that the devise to John J. of the inheritance, without designating the time of the commencement of his estate, does not make that devise repugnant to that which gave the defendant an estate *durante viduitate*. And the last of the above cited cases shows that the omission to state the time when John J. should come to the possession of his inheritance, while the period for the distribution of the residue of the personal estate was fixed by the will, furnishes no argument against the interpretation which gives an interest in the lands to the defendant. There is one fact which would seem, at first view, to favor the plaintiff's construction of this will ; and that is this, that John having no pecuniary legacy, and not being able to come to his real estate nor to his share of the residue of the personal estate, during the widowhood of the defendant, was subject to be left for a period without any provision at all. John, however, was but a child in 1825 when the testator made his will, and the period when he would need an advancement was so distant that it probably escaped the attention of the testator. This is far more likely than that he could have intended to invest his infant son with the immediate possession and income of one of the most valuable farms in the county of Herkimer, thus leaving his other children with greatly disproportioned legacies, and his wife without a dollar.

II. The plaintiff's counsel insists that, if the defendant did take an estate in the lands, during her widowhood, nevertheless, the lease executed on the 10th of April, 1837, by the defendant, for the term of her natural life, operated as a *surrender* to the husband of the plaintiff, of the estate of the defendant, and that the two estates became merged and united in one ; so that the husband became seised of the entire estate, in *præ-*

 Beardslee v. Beardslee.

senti, and his wife, by consequence, became entitled to dower in the same. This proposition is met by the defendant with two answers.

(1.) It is said that the reservations in the lease, of a part of the premises, for the use and occupation of the defendant, and the various restrictions and limitations contained in the lease, prevented the lease from operating as a surrender, and rendered the merger and union of the two estates legally impossible. It is also insisted that, by the provisions of the revised statutes, in the event of the death of the husband of the plaintiff before the expiration of the term (an event which has actually happened) the residuary interest in the term goes to the personal representatives of the deceased lessee; and that for this reason there can be no such union and merger, in law, as to give the plaintiff a right to dower. In support of this proposition the defendant's counsel has cited a great number of authorities, among which are the following: 6 *Com. Dig. tit. Surrender*, H. 316. *Id.* I. 2, 318, 319. 2 *Bl. Com.* 326. 4 *Kent's Com.* 101. 2 *Cowen*, 258. 4 *Kent*, 12, 355. 2 *Cruise's Dig. tit. 17, Reversion*, 4, 12, 13, 15. *Co. Lit. f. u. 7, a. Com. Dig. tit. 3, Estates for Life*, 93. 2 *R. S.* 82. 4 *Kent*, 267. It is doubtless true that the two estates must be re-united, so as to constitute ONE estate, or the wife cannot be endowed. It is laid down in 4 *Kent*, 39, that "The husband must be seised of a freehold in possession, and an estate of immediate inheritance in remainder or reversion, to create in the wife a title to dower. The freehold and inheritance must be consolidated, and be in the husband *simul et semel* during the marriage, to render the wife dowable." This would seem to be plain language, and yet there are authorities cited in connexion with this proposition, by the learned commentator, which render the true doctrine quite uncertain. It appears that the courts, in their leaning in favor of, and with the view of sustaining, the right to dower, have been satisfied with a kind of *sub modo* union of the two estates. And accordingly it has been decided that the union will be regarded as sufficient to create the title to dower, when an estate for years intervenes between the particular estate and the remainder.

Beardalee v. Beardalee.

(*Bates v. Bates*, 1 *Ld. Raym.* 326.) It is said to be otherwise where the intervening estate is not a chattel interest, but an estate for life. (4 *Kent*, 39, 40.) But

(2.) A second answer to the plaintiff's proposition is that, by the terms of the lease, the estate demised to the husband of the plaintiff, by the defendant, was *conditional*, liable to be *defeated*, and subject to a *re-entry* by the *non-payment of rent*; and that upon condition broken and a re-entry for that cause, the defendant became re-invested with her entire original estate, free from any incumbrance of dower.

This would seem to be a natural consequence arising out of the nature of the contract between the parties. The *estate*—the *entire estate*—is *conditional*, subject to be defeated by the happening of a condition subsequent. The same act which conveys the estate to the husband, creates in the wife the only right to dower which she can claim. The dower right in the wife is an incident, merely, of the conditional estate of the husband, and it would seem to follow as a necessary consequence that it should itself be conditional also. Upon the same principle upon which our supreme court have held (15 *John.* 458) that in the case of a deed and mortgage *simultaneously* executed for the purchase money, the right of the wife of the grantee was liable to be defeated by the foreclosure of the mortgage for the non-payment of the purchase money. So in the case of the lease, the rent is in the nature of purchase money, payable by instalments; and by parity of reasoning, the estate being subject to the condition, from its creation, the dower right of the lessee should partake of the conditional nature of the principal estate. This doctrine is fully borne out by the authorities. It is laid down in *Cruise, tit. 13, ch. 1, § 13*, that "It is a rule of law that a condition must defeat or determine the *whole* estate to which it is annexed, and not in *part* only." Again, in chapter two of the same title, at sections 59 and 60, we find the principle stated thus: "Where a person enters for a condition broken, the estate becomes void *ab initio*, and the person who enters becomes again seised of his original estate, and is in the same situation as though he had never conveyed it away.

 Beardalee v. Beardalee.

And as the entry of the feoffor or the feoffee, for a condition broken, defeats the estate to which the condition was annexed, so it defeats all rights and incidents annexed to that estate; for upon the entry of the feoffor he becomes seised of a paramount estate. *In consequence of this principle, if a man seised of a conditional estate marries, or a woman seised of such an estate takes husband, and has issue, and afterwards the condition is broken and the grantor enters for the breach, he will avoid all titles of DOWER and curtesy.*" In tit. 6, *Dower*, ch. 3, § 33, the author says, "There are several cases in which dower and curtesy cease upon the determination of the estate; 1st. Where the fee is evicted by title paramount; 2d. Where the seisin of the husband is wrongful and the heir is remitted, by which the wrongful estate is determined, the right to dower ceases; 3d. *When the donor enters for the breach of condition, it defeats the right to dower and curtesy.*" See also *Co. Lit. f.* 203, b; *Id.* 218, b; *Id. fol.* 202, a, b, and note 90; *Id.* 241, a, note 170, where it is said, "As entry for breach of condition defeats the estate of the tenant on condition; so it defeats his *wife's right of dower,*" &c. The same principle is found, expressed in the most direct and unequivocal language, in 5 *Vin. Abr.* p. 315, *Condition, o. d.* pl. 1; 9 *Id. Dower*, 1, pl. 4; *Id. Dower*, 1, pl. 3, p. 235; 3 *Com. Dig.* 492, *Dower*, A. 5. If this doctrine needed confirmation, it might be added that the authorities cited and relied on by Cruise, Viner and Comyn, are the very highest in the law.

The only case or dictum which has been furnished us, inconsistent with this current of authority, is found in *Co. Littleton*, 31 a, (4 note 180,) and purports to have been taken by the annotators from Hale's Manuscripts, and it reads thus: "*Lessee for life surrenders to him in reversion on condition, and enters for condition broken. Yet the wife of the reversioner shall be endowed.* (*Noy, n.* 284. *Osmund's case, Noy, 66.*)" This case, which is relied upon as the authority for the principle contained in this note, is thus stated in *Noy*, 66: "Osmund and wife surrender on condition, &c. *Plea, Ne unq. seiz. of dower.* (*See Dyer, 41.*) And by the court. If a man bargain and sell his

Beardalee v. Beardalee.

lands by *three words only*, and makes livery, that yet the bargainee (although that the indenture was never enrolled) may plead *that*, for a bargain includes a *grant*." It needs no argument to show that this case furnishes no authority for the principle laid down in the note in question. There is still less foundation for this principle in the case referred to in *Dyer*, 41. That was a writ of dower, to which the tenant pleaded *ne unq. seiz. dower*, and on the trial the facts disclosed were these; a feoffment made to the husband of the defendant, in fee, which on the face of the deed showed *seisin* in the husband. In answer to this, it appeared that long before the feoffment the husband was seised of land to him and his first wife in special tail, and they made a discontinuance and took back an estate in fee by the feoffment aforesaid, and died seised of such estate; wherefore the heir who was tenant in tail was *remitted*, and *therefore* the *second wife* not dowable thereof. And though the court held this to be the law, yet they allowed the demandant to recover, because these facts could not be proved *under the issue between the parties*. This case, it will be seen, turned on a question of pleading, but is in truth a case belonging to a class of authorities directly opposed to the principle contained in the note in question. This note having been disposed of, we believe the current of authority remains unbroken, in support of the general proposition, that when the grantor of an estate on condition enters for condition broken, the dower of the wife falls with the estate of the husband. This leads us to the only remaining question; which is

III. Whether it is proved in this case that the defendant has re-entered for condition broken? This proposition consists of three branches. (1.) Was the condition broken? That is proved by the production of the lease, which is a part of the case, upon which it appears that the rent is due, and no proof of its payment. (2.) Has the defendant actually re-entered? That also appears by the case. (3.) Did she enter on *account of condition broken*? That the condition was broken, and that the defendant having a right to re-enter for that cause has *actually* re-entered, would seem to lay the foundation for a strong pre-

Beardslee v. Beardslee.

sumption that she re-entered for that cause. The provisions of the revised statutes, (2 R. S. 505, §§ 30, 31, 32,) contain the directions for a re-entry for non-payment of rent, by ejectment. And if these directions have been complied with, no other evidence can be necessary under this branch of the case. 'The plaintiff's counsel, on the argument, objected to the judgment record and execution in the suit against the husband of the plaintiff, as being competent evidence against her. On looking into the case, however, it will be found that no evidence was objected to, but that all the facts were *admitted by the parties*. Now the *fact*, necessary to make the chain of evidence perfect, is the re-entry by the defendant for the breach of the condition of the lease. And we find it *admitted* in the case, that the defendant, in May term, 1843, 'commenced her action of ejectment against the plaintiff's husband, for the land in question, and filed her affidavit of the amount of rent due, &c. and took a judgment by default against him on the 8th of June, 1843. And that on the 13th of June the defendant re-entered by virtue of a writ of possession, and has remained in possession ever since. It is also stated in the case that a copy of the record, writ of possession with the sheriff's return, and the affidavit filed by the defendant, are annexed and make a part of the case. Now we repeat that all this evidence was put in by consent and admission, without any objection except that stated in the last clause of the case, which is the usual allegation, that the foregoing facts are taken subject to all legal exceptions and objections, and with liberty to turn the case into a bill of exceptions, &c. Now we regard this as nothing more than that the case is made subject to the legal conclusions arising upon the facts contained therein. Had it been the intention of the plaintiff's counsel to reserve the right to raise an objection to *the character* of the evidence offered to prove the re-entry, he should, instead of admitting the *fact* in so many words, have objected for that reason, and then the appropriate testimony might have been given.

Our conclusion on the whole case is, that judgment must be entered for the defendant.

Judgment for the defendant.

SAME TERM. *Before the same Justices.*

SPENCER vs. THE UTICA AND SCHENECTADY RAIL-ROAD
COMPANY.

In an action on the case against a rail-road company, to recover damages for injuries sustained in consequence of their negligently running their train of cars against the plaintiff's wagon, while he was crossing the rail-road track, in order to warrant a recovery, it must appear that the defendants' agents were guilty of negligence, and that the plaintiff was himself free from negligence or fault.

Where evidence is introduced on a hearing before referees, upon a question of fact, and the referees come to a conclusion thereon, a new trial will not be granted on account of the incorrectness of their conclusion; whatever may be the opinion of the court upon that point.

MOTION by the defendants, to set aside a report of referees in favor of the plaintiff for \$150. The action was trespass on the case; plea the general issue. The facts are sufficiently set forth in the opinion of the court.

L. Ford, for the plaintiff.

F. Kernan, for the defendants.

By the Court, GRIDLEY, J. This action was brought to recover damages against the defendants for negligently running their train of cars against the plaintiff's wagon while he was crossing the rail-road track; by which act, his wagon was destroyed, and the plaintiff himself thrown out and severely injured. The plaintiff's house was situated north of the rail-road, and his meadow lay south of it, and the accident occurred on that part of the track over which he was accustomed to pass, in going to and from his farm, in the ordinary course of his business. It appeared by the testimony, that the injury was inflicted by the defendants' working train, which had for some weeks been in the daily practice of passing up loaded and returning empty, at about the same hours of the day;

Spencer v. Utica & Sch. R. R. Co.

and that on its return, the train was backed down by the engine placed in the rear of the cars, for the reason that there was no turning place east of the point to which the cars ran. At the time when the injury took place, the plaintiff was passing from his house on the north side of the rail-road, to his meadow on the south side, after a load of hay. He approached the track through a straight lane at right angles with it, leading from the old turnpike at which the plaintiff had a gate, a distance of 14 rods, to the railroad, from any part of which distance of 14 rods, there was an uninterrupted view of the western line of the road, for a mile in length, so that the train *might* have been, and *must* have been seen by the plaintiff, if he had turned his eyes in the direction from which the cars were approaching. We say this, because it is apparent from the diagram which forms a part of the case, as well as from the evidence, that, considering the length of the train, (234 feet,) neither the ashery nor the small tree mentioned in the case, could form any serious obstruction to the line of vision between the train and any part of the 14 rods, on which the plaintiff drove, in his approach to the rail-road.

Upon this state of facts, in order to warrant a report in favor of the plaintiff, the referees must have found two propositions established by the testimony : 1st. That the defendants' agents were guilty of negligence ; and 2d. That the plaintiff was without negligence, and without fault. Upon the first point there was much evidence before the referees, and whatever may be our own opinion of the correctness of the conclusion to which a majority of the referees came, we are all of the opinion that no new trial can be granted on that ground.

It was equally necessary for the plaintiff to establish the proposition that he himself was without negligence and without fault. This is a stern and unbending rule, which has been settled by a long series of adjudged cases, which we cannot overrule if we would. (See 1 Cowen's Rep. 78 ; 6 Hill, 592 ; 19 Wend. 399 ; 6 Cowen, 189, 184, 191 ; 5 Hill, 282.)

Now, upon the *undisputed facts* of this case, it is impossible to maintain that the plaintiff was free from negligence. Be-

Clarke v. Cummings.

cause, he either saw the train approaching before he drove upon the track, or he did not. If he *did*, it was an act of madness voluntarily to place himself in the way of the train. If he did *not*, as is most probable, but during the entire 14 rods allowed his attention to be attracted to his neighbor's load of hay, according to the testimony of one witness, *that* was an act of most lamentable want of care. We may deplore his misfortune and sympathize in his suffering, but we cannot change the rules of law to give him redress. This is a far stronger case against the plaintiff, than was that of *Hartfield v. Roper*, (21 Wend. 615,) where the court set aside a verdict for the plaintiff, in a case in which it appeared that the defendant with his team had ran over and injured a little child which was playing in the highway, on the ground that the child was guilty of negligence in being there, and not removing, in season to avoid the injury. The court there held that it was the duty of the circuit judge to have nonsuited the plaintiff.

If that case be law, then, upon the undisputed facts contained in the report in this cause, the plaintiff must be held guilty of negligence; and that being the case, neither a report of referees nor the verdict of a jury can stand.

Report of referees set aside, and new trial granted.

Meade J. C. Pratt & G. W. Allen J. J.

SAME TERM. Before the same Justices.

CLARKE vs. CUMMINGS.

What is a reasonable search and inquiry for the persons upon whose lives the continuance of the estate of a lessee is made, by the terms of the lease, to depend, is a mixed question of law and fact, to be determined upon the particular circumstances of each case.

The circumstances *may be* such as to render an inquiry of the tenant, only, a reasonable inquiry and search, *it seems*.

The conditions of a lease do not become severed, by a severance in the occupation

Clarke v. Cummings.

of the demised premises, and in the payment of rent to the lessor by the respective occupants, for the portion occupied by each.

Hence if either a lessee, or an assignee of the lease as to a portion of the demised premises, commits any act which, by the terms of the lease, creates a forfeiture of the estate, the forfeiture attaches to the whole of the premises embraced in the lease.

Where a lease contained a covenant, on the part of the lessee, that he would not cut or destroy any part of the timber and wood growing on the demised premises, except for making or repairing buildings to be erected on the land, and for necessary fencing, and fuel for one dwelling house, with a clause of re-entry by the lessor, for a breach of any of the covenants by the lessee; and it was proved in an action of ejectment brought by the lessor against the lessee, that the latter had cut timber and trees for purposes not authorized by the lease; *Held* that the lessee could not escape the consequences of the forfeiture incurred by such act, on the ground that he had procured his fire wood and fencing timber from other land, and that he had not withdrawn from the demised premises more wood than the lease authorized him to take, although he had used it for other purposes.

In such a case the fire wood of the tenant should be *reasonable estovers*.

Where a lessee covenants that he will not use any of the wood or timber growing on the demised premises, except for certain objects specified in the lease, if he uses wood or timber for other purposes, and such wood or timber is not suitable for the objects specified, he commits a wrong against the lessor, and diminishes the value of his reversionary interest in the premises. *Per GRIDLEY, J.*

A lessee, authorized by the lease to cut wood for fuel or fencing, must comply substantially with the conditions of the lease. He cannot omit, for years, to take fire wood and fencing timber from the premises, suffering the wood proper for those uses to be destroyed and wasted, and then, by way of compensation or indemnity, enter upon the premises and take timber and wood to which the lease gives him no right, *Per GRIDLEY, J.*

The receiving of rent, by a lessor, after the commission of acts by the lessee entitling the lessor to declare the lease forfeited, if the rent was accepted with a knowledge of those acts, amounts to a waiver of the forfeiture.

EJECTMENT for a farm, situated in the county of Otsego, tried at the circuit in that county in July, 1848, before Justice MOREHOUSE. On the trial, the plaintiff gave in evidence a lease from George Clarke of the first part, to Samuel Thomas of the second part, dated February 13, 1795, of lot No. 36 in the subdivision of great lot No. 24 in the Oothout patent, for and during the natural lives of the said Samuel Thomas, Phebe Thomas his wife, and John Thomas his son, so always that the term should not endure less than thirty-one years, and reserving an annual rent of six pounds nine shillings and six

Clarke v. Cummings.

pence, payable on the 4th day of February in every year. The said lease contained, among others, the following covenants: "And that he the said party of the second part, his executors, administrators or assigns, shall and will within the space of four years, to be computed from the day of the date of these presents, plant one apple tree on the said premises for every five acres contained in the premises hereby demised, in some convenient part of the said piece or parcel of land, in straight lines crossing each other at right angles, at the distance of thirty feet from each other; and as often as any of the said trees shall die or decay or be destroyed, during the term aforesaid, shall and will plant other trees in the place or stead of those which shall die, decay, or be destroyed, and the same trees shall maintain and keep in good and sufficient order; and that if default shall at any time during the said term be made in planting the said apple trees, or any of them, or in replacing such as shall decay or be destroyed, in manner and form hereinbefore provided, that then and in such case the said party of the second part, his executors, administrators or assigns, shall and will pay to the said party of the first part, his heirs or assigns, within one year after such default shall be made, the sum of twenty shillings for every apple tree so deficient. And also that the said party of the second part, his executors, administrators and assigns, shall and will, from time to time during the term aforesaid, retain and keep and set apart one-sixth part of the said land for wood, and shall not or will not cut or destroy, or permit any person or persons whatsoever to cut or destroy any part of the timber and wood growing thereon, excepting only for making or repairing the buildings to be erected on the said piece or parcel of land, and for necessary fencing, and fuel for one dwelling house on the same." The said lease also contained, after the above covenants, the following provisos: "Provided always, and these presents are upon the condition nevertheless, that if the said yearly rent of six pounds nine shillings and six pence, or any part thereof, shall be behind and unpaid by the space of six months after any of the days hereby limited for payment thereof, or if the said party of the second part, his executors,

Clarke v. Cummings.

administrators or assigns, shall neglect or refuse to perform any of the covenants contained in these presents, that then and from thenceforth it shall and may be lawful to and for the said party of the first part, his heirs or assigns, into the said piece or parcel of land hereby demised to re-enter, and the same and every part thereof to have again, repossess and enjoy, as in his and their first and former estate, any thing herein contained to the contrary thereof notwithstanding: and provided further, that, if the said party of the second part and Phebe Thomas and John Thomas aforesaid, or any of them, shall not reside on the lands hereby demised, and none of them can after *reasonable search and inquiry* be found, that then and in every such case after the expiration of the said thirty-one years, and after the expiration of one year from the date of a notice to be given in writing, by the said party of the first part, his heirs or assigns, to the *tenant* of the said land hereby demised, that such search and inquiry has been made without effect, it shall and may be lawful to and for the said party of the first part, his heirs or assigns, into the said piece or parcel of land, or into any part thereof in the name of the whole, to re-enter and the same to have again as his or their first or former estate, unless one of the said persons shall be produced before one of the judges of the court of common pleas of any county in the state of New York, or proof made by the affidavit of two or more credible witnesses, before any of the said judges, that one of the said persons is in full life, and unless the said party of the first part, his heirs or assigns, shall receive a certificate of such production and proof, and a note of the place of residence of such person, before the expiration of the said year, signed by the said judge." The lease also described the demised premises as containing 129½ acres of land.

Robert D. Campbell was then called as a witness by the plaintiffs, who testified that he served a notice on the defendant in January, 1847, of which the one shown him was a copy; that he served at the same time a similar notice on Hiram Denton; that he knew the farm the defendant lived on. Denton occupied a part of it. The notice was served on the 20th of Jan. 1847.

Clarke v. Cummings.

Witness served the notice by the direction of the plaintiff, who was with him at the time. Witness subsequently served notice on the defendant to pay rent, a year ago last spring. The notice referred to by this witness as having been served by him in January, 1847, was in the words and figures following: "To Messrs. D. A. Cummings and H. Denton. You will please take notice, that I have made reasonable search and inquiry to ascertain whether any of the persons are in being on whose lives the lease of farm No. 36, lot No. 24 in Oothout's patent, from George Clarke to Samuel Thomas, depends; and that I cannot ascertain by such search and inquiry that either of said persons is living. You are therefore notified to produce proof of the existence of one or more of the lives in said lease, agreeably to the covenants in said lease contained; in default whereof proceedings will be commenced to recover the premises from you. Dated the 18th day of January, 1847. Yours, &c. George Clarke." Richard Cooper, a witness on the part of the plaintiff, testified that he was the agent of the plaintiff, and was the agent of his father when living; that for the first few years from 1830, when he commenced to act as agent, the rent on farm No. 36, lot No. 24, Oothout's patent, was paid by Samuel Thomas as the lessee, and then the defendant and Hiram Denton paid it; witness thought they had paid it since 1835, up to the rent which was due in February, 1847; that rent was paid in the spring or summer of 1847; and that with the exception of the rent due in February, 1848, all the rents had been paid. On his cross-examination the witness stated, George Clarke, the plaintiff, became first entitled to the rents in July, 1843, when he became of age; that the plaintiff had made inquiries of the witness concerning the lives in the lease of farm 36, but he did not know of his making any other inquiries except from his declarations. The witness inquired concerning the lives; he asked the defendant, two or three years before the service of the notice, to prove his lives, if any of the lives were in being; and he said that Mrs. Thomas, his wife's mother, was living in Chautauque county, but he could not state in what part of the county; the rest he thought were dead. Witness could not

Clarke v. Cummings.

peak with confidence as to the time he inquired of the defendant; it was at least a year before the service of the notice. Denton paid rent in 1847. Hiram Denton was sworn as a witness by the plaintiff, and testified that he occupied half of the farm in question; that he knew Samuel Thomas, who lived where the defendant now does; that Mr. Thomas was dead; that the defendant had occupied his part of the farm a number of years; that witness knew Phebe Thomas, Samuel Thomas's wife. John Thomas and Phebe Thomas did not reside on the premises in January, 1847; witness lived on a farm adjoining the defendant's. Mrs. Thomas lived where the defendant now does, when witness came into the country; witness thought she had now been gone some eight or ten years; she went to the western part of the state; from the time she left she had not been on the farm or in that part of the country, to the witness' knowledge, nor had John Thomas, the son. The defendant married a daughter of Mrs. Thomas. Robert D. Campbell was then recalled by the plaintiff, and testified that at the time of the service of the notice on the defendant and Denton, the plaintiff asked Denton if any of the lives were living; he said he did not know that there was, but they said there was one living. On the evidence thus introduced on the part of the plaintiff the counsel for the defendant maintained and insisted that the plaintiff had not shown that he had made the reasonable search and inquiry for the lives which the lease required, and that he had not therefore made out a right to serve the notice to prove the lives. The counsel for the plaintiff maintained and insisted that such reasonable search and inquiry had been shown, and that the plaintiff had therefore a right to serve the notice to prove the lives.

The court ruled that the facts proved by the plaintiff did not show that he had made the reasonable search and inquiry for the lives required by the lease, and that therefore he had no right to serve the notice on the defendant to prove the lives; and that the defendant was not bound to answer such notice. To this decision of the court, the counsel for the plaintiff excepted. The plaintiff then proved by Benjamin Huntington

Clarke v. Cummings.

that he was a surveyor ; that a few days before, he had surveyed and measured the woodland on the farm in question ; that there was thirteen acres, one rood and eleven rods of woodland on the farm ; that in his opinion not more than one-half of this could be called timber, the rest was wood of second growth, some older and some younger. That the wood on the farm was in three separate parcels. That one parcel contained 5 acres 29 rods, which was on the part of the farm occupied by Denton. That another parcel contained 5 acres, 1 rood and 6 rods, that of this rather more than one half was on the defendant's part of the farm ; that the remaining parcel contained 2 acres, 3 roods and 16 rods, all of which was on the part of the farm occupied by the defendant. That besides these three parcels, there was a strip of brush some 30 or 40 rods in length ; and in some places a rod in width, and in others hardly any thing, and also about 13 trees in another part. That he also ran around and measured the boundaries of the farm, and according to his calculation, it contained 136 acres, 3 roods and 26 rods of land. William Grover, a witness for the plaintiff, testified that he resided near the defendant, his land adjoining the defendant's ; that he knew the farm the defendant lived on ; that witness' house was near the southerly line of the defendant's farm ; that he had seen the defendant's son, Alexander Cummings, cutting wood on the part of the farm in the occupation of the defendant ; he was living with his father at the time ; that he cut over a small spot ; witness saw a coal pit near where he was cutting ; after witness saw him cut, he cut at different times in the summer of 1840, and the coal was burnt in the fall ; that witness had himself cut wood on the same part of the farm ; that witness and his father had about seven acres of the farm, for which they paid rent to Cummings and Denton ; that witness cut wood on it, first, in 1840, and several times since. The wood so cut was burnt in witness' house, which was not on this farm but on his own land. That he had also cut on the same land since 1840, one tree as a shaft for a saw-mill ; that he had seen wood cut on Denton's part of the lot ; that he had seen several persons cut there ; had seen Mr. Denton's boys chop

Clarke v. Cummings.

firewood; about four years ago, Mr. Denton hauled some maple logs to witness' saw-mill, from the farm in question, they were sawed into wagon axletree stuff principally; there were between twenty and thirty logs; another lot of timber was hauled by Mr. Denton, last winter; this was a few hemlock logs, about a dozen, some green and some old. Witness could not say how many of them he cut on the leased farm; some had been sawed into plank, the others were not sawed yet. On his cross-examination, the counsel for the defendant offered to show by the witness that the defendant obtained his firewood and fencing-stuff not from the farm in question, but from another. This testimony was objected to by the counsel for the plaintiff as irrelevant, but the objection was overruled by the court, and the testimony allowed to be received. To which decision of the court, the counsel for the plaintiff excepted. The witness then testified that the defendant had got his firewood from another farm; witness thought he had seen him get it every season; that he had not got firewood from the farm in question, within the last eight or ten years to witness' knowledge; witness had seen him get wood frequently from his other farm, but did not know of his cutting any fence timber on the farm in question, in the last 8 or 10 years, what stuff he had used he had got from the other farm; that Hiram Denton had another wood lot; that witness could not tell what kind of timber was put in the coal pit; but thought it was principally alder. On being re-examined by the plaintiff, the witness testified there were other trees growing where the defendant cut besides alders, there were elm, birch, beech, and other kinds; that there were half a dozen left standing; that alders grow to the height of 25 feet, when they usually die and others spring up; some of those cut were two or three inches, some perhaps four inches through. Jerome Snyder testified that he was a blacksmith, and had bought coal of Alexander Cummings, the son of the defendant; that he went on the defendant's farm for the coal; that he went where the coal pit was, and got about two hundred bushels; that he could tell from coal the kind of wood from which it was made; that this coal was most-

Clarke v. Cummings.

ly made from alders ; the alders might have been three or four inches through, though a good deal of it was smaller.

Hiram Denton being recalled by the plaintiff, testified that the house in which he lived was not on the farm in question ; that it stood on land of his own, adjoining ; that there was but one house on the farm which was occupied by defendant ; that witness had cut timber on the farm in question ; it was mostly wild when he came on to it, thirty years ago. There was then ten or fifteen acres improved ; witness had cut wood on the farm within a few years past ; that he had cut different kinds, some for stakes, some for rails, and some for firewood ; that he cut some to draw to mill, but none that grew on the wood-land ; it was maple timber ; that he could not say whether he drew the hemlock to mill from his own land or the farm in question ; that he sold one thousand feet of the sawed maple stuff, a part of it he had piled up, and a part he used for fence ; that he had not cut any other wood on the farm except for clearing ; that he had bought his own wood chiefly, and most of his rail timber for some years ; that some four or five years ago, he cut nearly two acres for the purpose of clearing ; it had been burned over, and since then a half a dozen loads, which were the tops of trees, he had cut for fencing ; that witness sold part of the wood that he cut from the two acres he cleared, and burnt the rest at his own house ; that there had been no wood cut on Cummings' part since witness cleared the two acres, that he knew of ; that he had cut for fencing since clearing the two acres, and cut the maple timber a year or two before he cleared the two acres ; that about the same time he cut the maple he cut some loads of wood which he burnt in his house ; that he should not think there was much less wood on the farm now than when he cleared the two acres ; that he had occupied a separate part of the farm during the time, he had been there for thirty-three years ; that his father first lived on it, and he succeeded him ; the rent for that portion had always been paid separate ; formerly took receipts separate ; now witness takes separate receipts for the portion of rent paid ; and that Cummings pays in the same way. When witness pays

Clarke v. Cummings.

rent he pays on that portion of the lot. Receipts for half the lot were taken from Mr. Morell; witness could not say how long defendant had been on the farm, but he thought eight or ten years; that the defendant had got all his wood from other lands; that at the time of clearing the two acres there was a little over eleven acres left on his part; that there had been no rail timber on the farm for several years; that witness had bought rails; that the quantity of wood-land now was about the same as at that time; that witness twice paid rent to Mr. Morell for his father, and on one occasion took a separate receipt for his part, that is for the southerly half of the lot; and he thought he had seen two other such receipts; but had taken no such receipt since; that he had paid rent for himself 20 or 21 years; that the money was paid either on account, or in full, according as defendant had paid before or not; witness paid rent the last time a year ago last May. Robert D. Campbell was then recalled by the plaintiff, and testified that he was with Mr. Huntington when he surveyed the farm, and saw two hemlock trees lying on defendant's part of the farm; they had been cut down, one had been cut down longer than the other, and had the appearance of being cut five or six years, the other looked as if it had been dead when standing, and not long cut; that witness counted the apple trees on the farm; there were twenty-three, of these there were three decayed; one of the trees was by itself in another lot; this was sound; his were in the same lot as the orchard, but stood two or three feet apart and about 4 rods from the rest; of these two, one was partly decayed, the other decayed tree was in the orchard in one of the rows; that these were all the apple trees standing on the farm, and were all on the part occupied by the defendant; that the tree that had its body decayed looked as if it had been decayed some time; that witness counted the trees from the road, and had directions to count the trees from the plaintiff; did it last Saturday, and since the survey was made. The witness also testified, in answer to a question by defendant's counsel, that he served a notice to pay rent on this farm in the spring of 1847. Richard Cooper was then recalled by plaintiff, and testified that since

Clarke v. Cummings.

his agency began he had never received the rent of one half of the farm as such ; that the account had been kept with the whole farm, and whenever any payment was made less than the whole rent due, it was received and credited on account of rent ; that as respects the amount paid, Mr. Denton and the defendant have each paid one half of the rent ; that Mr. Clarke, the lessor, died in November, 1835, and the plaintiff is his devisee. The testimony for the plaintiff being closed, the counsel for the defendant moved for a nonsuit, and in support of such motion maintained and insisted that notice to quit was necessary before the action could be maintained ; that there was no breach of the covenant in respect to wood, because the defendant, since his occupation of the farm, had obtained his fire wood and fencing stuff elsewhere, and had not used from the farm for these purposes near as much as he had a right to, under his lease. That as the defendant and Denton occupied in severalty, and each had paid one half of the rent, no act or omission of Denton on his part of the farm, could work a forfeiture of the estate of the defendant ; that the defendant was bound to have on his part of the farm only one half of the whole number of apple trees required by the lease, and having materially more than this, there could be no forfeiture of his estate on the ground of a deficiency of apple trees ; and that if there were any forfeiture of the lease, for any reason, it had been waived by the acceptance of rent accruing since the forfeiture. The counsel for the plaintiff, in opposition to such motion, maintained and insisted that in the case of a re-entry for a forfeiture, no notice to quit was necessary ; that the covenant in respect to the wood had been broken by the defendant, even if the acts committed on his part of the farm were alone taken into consideration ; that as there was less than one-sixth of the farm in wood the defendant had no right to cut a single stick, except for the purposes named in the lease ; that all the wood standing on the farm, then being less than a sixth, was subject to the covenant, without regard to the circumstance that the defendant had obtained his fire wood and fencing timber elsewhere, instead of cutting that growing on the farm ; that there was no sever

Clarke v. Cummings.

ance of the lease on the part of the landlord, so as to restrict the consequences of a forfeiture by Denton to his portion of the farm; and that if there was a forfeiture of his part there was of the whole; that the covenant in respect to the apple trees was broken; that this was a continuing covenant; that the acceptance of rent only waived the breach of it up to the time of such acceptance; and that if, as in this case, the breach continued, a forfeiture resulted; that if the whole number of apple trees was less than the lease required for the whole farm, a right of re-entry existed against the defendant, although he had more than half the number on his portion of the farm, and that acceptance of rent merely was never of itself a waiver of a forfeiture; that to produce this effect it was necessary that the landlord should have a knowledge of the facts constituting the forfeiture, of which there was no evidence in this case. The court decided that the covenant, as to the wood, was for the benefit of the farm, and not of the reversioner. That where the covenant is a continuous one, a breach before assignment cannot be revived against an assignee without notice to the assignee that he must comply with the covenant. That in this case the landlord having received rent from the tenants of the farm for many years, in moieties, he had thereby consented that they might occupy in severalty. And that under these circumstances a breach of the covenant relating to the wood, by Denton, on his part of the farm, did not operate as a forfeiture of the estate of the defendant. That the claim of the plaintiff being *stricti juris*, the case should be brought within the penalty, on a liberal construction of the covenant. That there should be a breach of the spirit of the contracts as well as the letter, and that the cutting and disposing of the alders by the defendant, a short lived wood, and soon replaced by the growth of other alders, was no breach of the covenant in the lease in respect to wood. That as to the apple trees, there was no evidence that the requisite number was not standing at the time of the commencement of the suit; but granting that there was a deficiency at that time, it was from decay, and must have been of years standing, and the forfeiture from

Clarke v. Cummings.

this cause having been repeatedly waived by the acceptance of rent, could not be enforced without notice to the defendant to fulfil the covenant. That as the defendant had on his half of the farm more than one-half of the number of apple trees required for the whole farm, there could not be, as respected him, under the circumstances of the case, a forfeiture for a deficiency of these trees. The court, for these reasons, granted the motion for a nonsuit; and the plaintiff, on a bill of exceptions, moved to set the nonsuit aside.

R. Cooper, for the plaintiff. I. The lease was forfeited by not producing proof of the existence of one or more of the lives; and the judge erred in ruling that, on the facts shown, the plaintiff had no right to serve the notice to produce this proof. The covenant on this subject contemplates that unless the landlord, on *reasonable search* and inquiry can *actually* find one of the persons on whose lives the lease depends, and it becomes necessary to resort to *evidence* to ascertain the existence of one of them, that such evidence shall be furnished by the tenant, in the manner, and of the kind, specified in the lease. But if the landlord, notwithstanding none of the persons sought for can be found on reasonable search, is still bound to make reasonable inquiries, to ascertain whether or not any of them be living, the covenant was broken by the non-production of the required proof, because the plaintiff did make such inquiries. (*Bank of Utica v. Bender*, 21 *Wend.* 643.) II. The lease was forfeited by a breach of the covenant in respect to the wood; and the judge erred for this reason in granting a nonsuit, and also in his ruling in reference to this point. The defendant by his own acts, and the acts of those holding under him, had broken this covenant, and consequently his estate was forfeited, even if the law, as respects him, would not create a forfeiture from the acts of Denton his co-tenant. (13 *Wend.* 530.) There was no waiver of the forfeiture by the plaintiff. (3 *Cowen*, 231. 7 *John.* 235. *Tay. Land. & Ten.* 61. 1 *Man. & Ry.* 694.) The judge erred in ruling that this covenant was for the benefit of the farm, and not of the reversioner. The judge

 Clarke v. Cummings.

erred in ruling that cutting the alders was not a breach of this covenant. (13 *Wend.* 530. 7 *John.* 234, 5. 1 *Id.* 270. *Tol. Law of Ex'rs*, 193.) The estate granted by the lease was forfeited by the breaches of the covenant, in regard to the wood, committed by Denton, the co-tenant of the defendant. The judge erred in ruling that the receipt by the landlord, of the rent in moieties, from the defendant and Denton, respectively, under the circumstances, prevented the acts of Denton from working a forfeiture of the estate of the defendant. (7 *John.* 227. 1 *Id.* 267.) All derivative estates are defeated by the operation of a condition. (*Shep. Touch.* 120, 1. 20 *Law Li.* 233, 275. *Preston on Estates*, 46. *Bac. Abr. tit. Conditions. O. 4. Co. Litt.* 202. *Wood. Land. & Ten. by Harrison*, 228.) A condition cannot be divided: if it exist at all it must exist as to the whole premises, unless by express agreement, at the time of its creation, it be restrained to a part. (*Shep. Touch.* 121, 127, 157, 158.) III. The lease was forfeited by a breach of the covenant in regard to the apple trees; and the judge erred for this reason in granting a nonsuit. The requisite number of trees was not standing. This was a continuing forfeiture. (13 *Wend.* 530. *Tay. Land. & Ten.* 61. 1 *Man. & Ry.* 694. 1 *John. Cas.* 125.) The judge erred in ruling that in such cases a notice to the tenant to comply with the covenant was necessary before the forfeiture could be enforced. (13 *Wend.* 530.) IV. The judge erred in admitting the evidence in respect to the defendant's getting his wood elsewhere.

E. Brown, for the defendant. I. The plaintiff had no right to serve the notice until he had made reasonable search and inquiry, which he had not done. (*Hogeboom v. Hall*, 24 *Wend.* 150.) II. The nonsuit was right. (1.) The covenant for the wood was for the benefit of the farm, and not for the benefit of the reversioner. (23 *Wend.* 506. 2 *Bl. Com.* 122, 283.) (2.) The breach, if any, being before the assignment, could not be revived against the assignee without notice to the assignee that he must comply with the covenant. (7 *John.* 283.) (3.) The landlord, by receiving the rent in moieties, consented to the oc-

Clarke v. Cummings.

cupancy in severalty, and Denton's cutting wood did not operate as a forfeiture. (*Ad. on Eject.* 193, 148, 174, 195. 1 *Denio*, 516. 3 *Id.* 135.) (4.) The claim of the plaintiff being *stricti juris*, the case should be brought within the penalty, on a liberal construction of the covenants. (7 *Hill*, 253. *Ad. on Ej.* 162, 192, 173. 15 *John.* 278.) (5.) Cutting the alders was not a breach of the spirit of the contract in respect to wood. (6.) There was no evidence that there was not the requisite number of apple trees when the suit was commenced; but if there was a forfeiture, the same had been waived by the acceptance of rent. (*Ad. on Ej.* 193. 13 *Wend.* 530. 3 *Cowen*, 229.) The tenant might pay twenty shillings, or plant the trees in one year. (7.) As the defendant had more than half the number of trees required on the whole lot, there could be no forfeiture. III. If the defendant and Denton did not hold the premises in severalty, still the acceptance of rent was a waiver of that breach: and as there was no breach of covenant on account of the wood and in taking rent, the estate is not forfeited by any subsequent acts. (*See* 13 *Wend.* 530; 3 *Cowen*, 229, and cases above cited.) Enough was proved, to show a knowledge of the forfeiture, if any, in the plaintiff. If there was any doubt, he might have had the case submitted to the jury on the questions of fact.

By the Court, GRIDLEY, J. What is a reasonable search and inquiry for the lives upon the continuance of which the estate of the defendant in this cause was made by the terms of the lease to depend, is a mixed question of law and fact to be determined upon the particular circumstances of the case. What would be reasonable in one case might not be in another. I am of the opinion that the circumstances *may be* such as to render an inquiry of the tenant *only*, a reasonable inquiry and search. If it were proved that the tenant was the *only* relation of the person whose life was in question, living in the vicinity of the lands, then an inquiry of the tenant would be enough; provided it were made at a reasonable time before the service of the notice to prove the existence of the lives in ques-

Clarke v. Cummings.

tion. In this case, although the tenant was a son-in-law of Mrs. Thomas, it does not appear but that she had other and nearer relatives, of whom a more successful inquiry could be made. In truth her own daughter, (the wife of the tenant,) might have been able to give information, in relation to the person with whom her mother was residing, and in relation to the residence of such person, had the inquiry been made of her. Again; had the tenant himself been a second time inquired of within the year or two which preceded the service of the notice upon him, it is by no means improbable that he would have been able to satisfy the inquiry. If Mrs. Thomas was indeed living in the county of Chautauque, it was within the power of the tenant to have ascertained the particular place of her residence; and his interest to preserve his land, prompted by Mr. Cooper's inquiry, would naturally have led him to do so, before the notice was served. In the absence, therefore, of all such inquiries as have been suggested, I think the judge was right in holding that *at the time when* the notice was served, reasonable search and inquiry had not been made. It is no answer to say that, if Mrs. Thomas was alive she might have been produced, or proof made, pursuant to the provisions of the lease, that she was alive, within the year after the service of the notice. Such production and proof would have imposed a burden upon the tenant, which he was not bound to assume, until a search and inquiry, such as should be reasonable, had been made by the landlord. We do not think that a foundation was laid for calling on the tenant to produce Mrs. Thomas, or to prove the continuance of her life under the provisions of the lease.

We however do think, that there was proof which raised a presumption of her death, which, if that had been made a ground of objection to the nonsuit, the defendant should have been required to repel by evidence. It is enacted (1 R. S. 749, § 6) that "if any person upon whose life any estate in lands or tenements shall depend, shall remain beyond sea, or shall absent himself IN THIS STATE or elsewhere, for seven years together, such person shall be accounted *naturally dead, &c.*

Clarke v. Cummings.

unless sufficient proof be made in such case of the life of such person." This is a substantial transcript of the former act, which was passed in 1788, and is found in 1 *R. L.* 103, § 1. Accordingly we find it laid down (2 *Phil. Ev.* 285) that "the presumption of the continuance of human life ends, in general, after the expiration of seven years from the time when the person *was last known to be living.*" The same rule is laid down, in the same way, by Starkie. (*Stark. on Ev. part 4*, 457, 1121, 1252. See also 6 *East*, 80; 4 *Barn. & Ald.* 433; 2 *Id.* 386.) In this case there was no evidence of the existence of the life in question, except what was derived from the defendant himself, for the last eight or ten years. It was therefore not a case to be adjudged in favor of the defendant upon this point, had the plaintiff's counsel presented this question to the justice upon the trial.

The lease under which the defendant claimed, contained several covenants to be performed by the lessee; and it was made a condition that the lessor, his heirs or assigns, might re-enter for a neglect or refusal to perform any of the covenants. One of the covenants is stated in the following words: "And also that the said party of the second part, his executors, administrators and assigns, shall and will from time to time during the term aforesaid, retain and keep and set apart *one-sixth part* of the said land for wood, and shall not, or will not, cut or destroy, or permit any person or persons whatsoever to cut or destroy *any part of the timber and wood* growing thereon, excepting only for making or repairing the buildings to be erected on the said piece or parcel of land, and for necessary fencing, and fuel for one dwelling house on the same." The premises were estimated in the lease to contain 129½ acres of land, one-sixth of which would be 21 acres and a fraction over. A surveyor testified that he had ascertained the quantity of wood land remaining on the farm, and the same fell about seven acres short of the required quantity. It also appeared that for several years past the farm had been occupied in two parcels, by the defendant and one Denton, who had occupied the premises and paid their rent in severalty. The rent, however, though paid by each

Clarke v. Cummings.

tenant, for the part which he himself occupied, was nevertheless received by the agent of the plaintiff, and credited on the lease generally. Upon this state of facts several questions arose upon the trial, and are now presented for our decision.

1st. Whether, by this severance in the occupation of the premises and in the payment of the rent by the respective occupants, the conditions of the lease have become severed, so that an act which would work a forfeiture of the lease, if committed by a sole tenant, will now work a forfeiture of the share only which is held by the tenant who commits the act. In other words, whether the several tenants are to be treated as separate lessees, each of whom is responsible for his own acts only.

No authority has been cited which shows that when the covenants and conditions are entire, as they are here, embracing the whole premises conveyed by the lease, and by the very terms of the lease made applicable to them as to one undivided parcel of land, or farm, the mere receiving, from the several occupants, for their convenience, the portions of rent agreed on between the co-tenants as the portions of each, will have the effect to work a change in the scope and application of the covenants. If this were so, the intention of the lessor, to preserve a given quantity of wood and timber land, and to protect the premises from the destruction of wood and timber on the part so reserved, would be liable to be utterly defeated. On the contrary, we understand the rule to be established otherwise; and that such a consequence does not follow unless the title to the reversion, or the right to receive the rents, has been severed, so as to be vested in different persons. (*See 3 Kent's Com.* 469; *3 Denio*, 140; *1 Id.* 516.) In this particular case, all that could, in any view of the case, be inferred against the lessor, would be a consent to a separate holding and occupancy, by the second tenant, SUBJECT however to the covenants in the lease. This was expressly so held in *Jackson v. Bronson*, (7 *John.* 227.) In that case, the lessee assigned the north half of the premises (by the written consent of the lessor) to one Shaw, who cut off all the timber on his part of the lot. It was there held, however, that the lessee was responsible for any act of his assignee

Clarke v. Cummings.

amounting to a breach of the covenants or conditions of the lease. (*See opinion of Van Ness, J. on p. 232, citing Cro. Jac. 521; Cro. Car. 188, 580.*) We therefore think that if either the defendant or Denton has committed any act which, by the terms of the lease, creates a forfeiture of the estate, the forfeiture attaches to the whole lot originally leased.

2dly. The next question is, whether the acts of cutting off the wood and timber, which were proved on the trial of this cause, have worked a forfeiture of the estate.

(1.) The very fact of cutting and clearing off the wood from the farm so as to leave only 13 instead of 21 acres of wood, was an act which created a forfeiture, by the very terms of the covenant, unless the quantity of wood land was thus reduced, by the cutting it off for the purpose of building, repairing, fencing, or fuel for one dwelling house. The testimony does not inform us how much of the seven acres was cut off for those purposes; but there is no dispute but that the two acres cleared off by Denton, four or five years ago, were so cleared off without reference to any such purpose as authorized an encroachment upon the 21 acres. It is true that the forfeiture may have been waived by the subsequent receipt of rent by the lessor with a knowledge of the forfeiture.

(2.) It appears by the testimony, that since the quantity of woodland has been reduced below the number of acres reserved by the lease, valuable timber has been cut and sold for a mill shaft; some 20 or 30 maple logs have been sawed into timber fit for wagon axletrees, and disposed of to purchasers; alder trees, of a size varying from 2 to 6 inches in diameter, have been cut and burnt into coals and sold off the farm, besides some other wood which has been used for fire wood elsewhere than on the farm. This was all attempted to be justified, upon the ground that the tenants procured fire wood and fencing timber from their other lands, and that they had not withdrawn from this particular lot more wood than they were authorized to do by the lease, though they had used it for other purposes. We are aware that these covenants are to be liberally construed to prevent a forfeiture; but we do not believe that the court can

Clarke v. Cummings.

make for the parties a new contract, or essentially change the old one. It is still a binding contract upon the parties, and if either party has violated its plain provisions, he must submit to the consequences prescribed by the instrument itself. We are therefore bound to hold that the fact that the tenant has chosen to procure his fire wood and fencing timber from other lands, does not justify him in cutting and selling valuable timber which good husbandry would dictate should not be used for either of those purposes. This would be to allow the tenant to change materially the terms of the covenant. His fire wood should be *reasonable estovers*, which would require him to use first the dry and dead trees, if such were to be found on the premises; and the cutting of green trees for such use, without necessity, would be waste. (7 T. R. 234.) By what authority, then, can he say, "I will leave this fire wood to decay on the premises, and indemnify myself by taking valuable timber in its stead?" So, too, the most appropriate timber for fencing should be used; and the lease does not authorize the tenant to procure his rails from other premises, and make that an excuse for selling off the valuable maple timber. Again; it would seem that there was a large growth of alders on this farm, and that this kind of wood is valuable for coal. This was a kind of wood or timber which the tenant had no right to remove from the land. And the fact that it is comparatively short lived, does not alter the rights of the tenant, under his covenant. He had no right to use any of the wood or timber growing on the premises, except for the specified objects; and when he uses wood or timber for other than the specified objects, and such wood or timber as is not suitable for these specified objects, he commits a wrong against the lessor and diminishes the value of his reversionary interest in the premises. We see no justification for these violations of the covenants in the lease. It will be observed, that we say nothing of a case, in which the tenant should take *precisely what*, and precisely as much, and no more than the lease authorized, though he should use it otherwise than was contemplated by that instrument. For instance, if he had a house, not on the premises, but near them, we do not

Clarke v. Cummings.

say that he could not use the fire wood, which the lease gives him, in his house, though not situated on the premises. What we mean to say is this, that he must comply substantially with the conditions of the lease. He cannot omit for years to take fire wood and fencing timber from the lot, suffering the wood proper for these uses to be decayed and wasted ; and then by way of compensation or indemnity, enter upon the premises and take timber and wood to which the covenant never gave him a right.

3dly. If the plaintiff has received the rent accruing after any of those acts which would give him a right to declare the lease forfeited, with a knowledge of those acts, the forfeiture is waived. But it must appear that he had knowledge of such acts. In 7 *John. Rep.* 234, 235, Judge Van Ness, says, in a like case, "It does not appear that the lessors or their successors knew that a forfeiture had been incurred, and the acceptance of rent, *unless they did, at the time, know of this fact, is no waiver.*" If there were facts in this case to show such knowledge, this question should have been submitted to the jury.

It is also argued that the premises have been forfeited by a failure to plant or replace the requisite number of apple trees. But we are of the opinion, with the justice before whom the case was tried, that there was no evidence that the number of trees was deficient when the suit was commenced. The only witness who gave any evidence on this point, made his examination but a short time before the trial. This was not enough. For aught we know, the missing trees had been torn up by the wind or otherwise destroyed after the suit was commenced.

A new trial is granted.

SAME TERM. *Before the same Justices.*

THE PEOPLE vs. LEGGETT.

A recognizance, taken in pursuance of an order of an officer authorized to let to bail, and by an officer having general jurisdiction to let to bail, and to take recognizances, though he be not the officer before whom the application to let to bail is pending, is valid; especially where the officer acquires jurisdiction of the person of the party, by his voluntary appearance and acknowledgment, and where the officer before whom the application is pending subsequently adopts the recognizance thus taken, and lets the prisoner to bail on the faith of it, and the recognizance itself is filed by him, and becomes a record.

DEMURRER to pleas. The action was debt on a criminal recognizance. The facts set forth in the pleadings, and the questions of law raised by the demurrer, appear from the opinion of the court.

J. Moore, Jun. (district attorney,) for the plaintiffs.

W. S. Bishop, for the defendant.

By the Court, GRIDLEY, J. In this case all the questions which arise upon the pleas to which demurrers have been put in, have been decided by the late supreme court, upon a demurrer to the declaration. The declaration is founded upon a recognizance dated on the 10th day of March, 1846, executed in the county of Niagara and acknowledged before the Hon. Nathan Dayton, circuit judge, conditioned that one Gabriel Leggett, who (as it was recited in the condition) stood indicted by a presentation made by the grand jury of Jefferson county, at the February term of the court of general sessions of Jefferson county in the year 1845, for a felony theretofore committed, should personally be and appear at the next court of general sessions to be holden at the court house in and for the county of Jefferson, on the last Monday of May, 1846, then and there to answer to said indictment, and further to do and receive what should then and there be enjoined upon him, &c. and

The People v. Leggett.

averring a breach of the said recognizance in the non-appearance of the said Gabriel Leggett at the time and place specified for his appearance, &c. To this declaration the defendant has pleaded—1. Nul tiel record. 2. That the recognizance on which the defendant was prosecuted was in the following words, setting it out. 3. That the said Gabriel Leggett was imprisoned in the county of Jefferson, and that the said recognizance was taken in the county of Niagara ; and that said Gabriel was never before said N. Dayton, and the said Dayton never made any order letting him to bail. The fourth plea sets out the recognizance *in hæc verba*, and then avers that said Dayton never made any order letting the said Gabriel to bail, and that said Gabriel was never before said Dayton. 5. That the *defendant* in this suit was not present when the judge (Sherman) in the declaration mentioned made any of the orders therein set forth. 6. That said Gabriel Leggett was not at any time present before the said Nathan Dayton, and that said Nathan Dayton never acquired any jurisdiction over the said Gabriel.

The pleas were severally demurred to, and many special causes of demurrer were assigned which we do not deem it useful to examine, for the reason that every fact which has been pleaded is stated in the declaration itself, and the whole matter of the pleas is *res adjudicata* by the decision upon the demurrer to the declaration in this very case.

The declaration, with great particularity, avers the indictment by a grand jury of Jefferson county of the said Gabriel Leggett ; his imprisonment on that charge in the jail of that county ; his application to Judge Sherman of the same county to be let to bail ; and the proposal, by the prisoner, of the defendant and one Joseph Fuller, residing in the county of Monroe, as his sureties ; his moving for an adjournment of the proceeding, to enable him to procure their recognizances to be taken, before some proper officer in another county ; the decision of the judge that the prisoner should be let to bail, on giving his own recognizance, and on procuring that of the two sureties proposed by him, acknowledged before some proper officer in, or near, the county where they resided ; and the adjournment of

The People v. Leggett.

the proceeding to enable the prisoner to procure the said recognizance. The declaration then alleges the making of the recognizance, setting it forth truly, and avers that on the adjourned day, it was produced before Judge Sherman, who received it and took the prisoner's own recognizance and caused the same to be filed in the office of the clerk of the county, whereby they *became records*, and thereupon discharged the prisoner on bail as aforesaid; and then averring a breach, in appropriate form. To this declaration the defendant demurred, and in his special causes assigned relied on all of the objections which are set forth in the pleas. The opinion of the court was delivered by the late Chief Justice Beardsley, a copy of which has been furnished to us, in which he declares that the declaration is good, upon a principle on which all the members of the court were agreed, in the case of *The People v. Kane*, (4 Denio, 530,) although as to some other points they held different opinions. This decision, having been made in this very case, and on the very points now presented, we regard as conclusive upon us.

The brief opinion to which we have referred does not explain, very clearly, the ground upon which the decision was placed. It may have been placed upon the ground that the recognizer having voluntarily appeared and entered into the obligation before an officer authorized both to let to bail and to take recognizances, and the recognizance having been received and acted on as though all the facts had existed, necessary to render it valid, and having been *filed and thus become a record*, the defendant was *estopped* from setting up any facts aliunde, which would render it void. I can readily perceive that the defendant should be held estopped from contradicting any fact, recited or alleged in the written obligation which he has signed. And if that contains enough to show jurisdiction in the officer taking the recognizance, then it is not perceived why the principle of estoppel is not a tenable ground on which to place the decision. If, however, the instrument itself does not contain any recital or statement which is inconsistent with the existence of other facts which would show that the officer had never acquired any jurisdiction to take the recognizance; then it is

The People v. Leggett.

difficult to see why such facts may not be shown, upon the familiar principle which admits of proof, aliunde, of the want of jurisdiction, to sustain an act or judgment of an officer or court of special and limited jurisdiction.

Again ; the decision may have rested, and we think *must* have rested, on the ground that nothing appeared on the face of the declaration to show that Judge Dayton had not jurisdiction to take the recognizance in question. For, if the facts, which appeared in the declaration, clearly showing that Judge Dayton was not the officer who entertained the application of the prisoner and finally let him to bail, would render void a recognizance taken by Judge Dayton in pursuance of an order of the officer before whom the application of the prisoner *was* pending, and who finally let him to bail upon the recognizance in question ; if those facts would show that Judge Dayton had no jurisdiction to take the recognizance, then the demurrer to the declaration should have been allowed. We therefore infer that it was the judgment of the court that a recognizance taken in pursuance of an order of an officer authorized to let to bail, and by an officer who had general jurisdiction to let to bail and to take recognizances, though not the officer before whom the application was pending, was valid ; especially when the officer acquired jurisdiction of the person of the party by his voluntary appearance and acknowledgment, and when the officer before whom the application was pending, adopted the recognizance thus taken, and let the prisoner to bail on the faith of it, and the recognizance itself was filed and became a record, we repeat, that we are bound to regard the court as holding such a recognizance good ; and we know of no provision of the statute, and no sound reason why it should not be held valid. We therefore, without any further examination of this case, allow the demurrer to the pleas.

Judgment for the plaintiffs.

Reversed. 2 Sels.

SAME TERM. *Before the same Justices.*

PIERREPONT and others, ex'rs of Pierrepont, vs. BARNARD.

An agreement for the sale and purchase of land contained a covenant on the part of the purchasers that they would not cut, or suffer to be cut, for sale, any timber from the land, without the consent or approbation of the vendor first had and obtained, *in writing*. In an action of trover, by the vendor, against a person claiming under the purchasers, for a conversion of lumber made from timber growing upon the land sold; *Held* that the defendant could not be permitted to give evidence of a *parol license* from the vendor to the purchaser to cut timber upon the premises.

Growing trees are real estate, and cannot pass, except by an instrument in writing.

If the identity of trees growing upon land contracted to be sold, with a covenant by the purchaser against cutting timber, can be traced into lumber, and the contract of purchase has not been performed by the payment of the purchase price, the title to the property continues in the vendor; and he may reclaim it in its altered state, either from the vendee of the land, or from a person claiming title to the lumber under him.

A *parol contract* for the sale of growing trees is void, by the statute of frauds, and conveys no title to the purchaser. And so, *a fortiori*, of a *parol license*, without consideration, to cut growing trees.

Where a license is given, by the owner of land, to another, to cut a limited quantity of timber upon the land, the cutting of any more than the quantity specified is a fraud upon the owner; and he is entitled to recover the value of the overplus, in an action of trover against the person cutting the timber, or one deriving title to the same under a judgment against such person.

Estoppels are not favored in the law. An estoppel *in pais* is never allowed to be used as an instrument of fraud; but is to be resorted to solely as a means to prevent injustice—always as a shield, but never as a sword.

TROVER, brought by Wm. C. Pierrepont and others, executors of H. B. Pierrepont, deceased, to recover the value of a quantity of lumber alleged to have been taken and converted by the defendant. The cause was tried at the Oswego circuit, in June, 1845, before GRIDLEY, circuit judge. The plaintiffs' declaration was in the usual form, for a trover and conversion; and the defendant pleaded the general issue. On the trial, the plaintiffs gave in evidence a contract bearing date August 1, 1840, between William C. Pierrepont, one of the executors of Hezekiah B. Pierrepont of the first part, and John R. Wood-

Pierrepont v. Barnard.

worth and Hiram A. Woodworth, of the second part, for the sale by the party of the first part, and the purchase by the party of the second part, of lot No. 155 in the town of Richland, in the county of Oswego. By this agreement the parties of the second part agreed to pay the sum of \$5530 for the lot, in three equal annual instalments; and they covenanted that they would not cut, nor suffer to be cut, for sale, any timber from such lot, without the written consent of the party of the first part. It was proved that the lumber for the conversion of which this suit was brought, was made from trees cut on the lot in question, by the Woodworths, or under their direction. The defendant claimed title to the lumber under a sale upon an execution issued against the Woodworths. He was notified at the time, and before the sale, that the lumber belonged to the plaintiffs, and the sale was forbidden, by their agent. The agreement for the sale of the lot to the Woodworths was executed by the plaintiff William C. Pierrepont, in pursuance of a power contained in the last will and testament of H. B. Pierrepont deceased. By that will the said William C. Pierrepont and Henry E. Pierrepont, the sons of the testator, and two of his sons-in-law, were appointed executors; and the testator desired that the sale and settlement of his lands in the northern and northwestern parts of the state of New-York, might be sedulously and vigorously attended to and prosecuted. And he directed that the separate signature of either of his said sons to contracts or articles of agreement for the sale of any lands situate in either of the counties of Oswego, Jefferson, &c. to actual settlers, should be sufficient; and that contracts or articles of agreement so signed, should be as valid and binding as if executed by all the executors. Hiram A. Woodworth was offered by the defendant as a witness; and he was objected to by the plaintiffs' counsel on the ground of interest, he being one of the persons named in the contract, and who had cut and taken the timber from the land. The objection being sustained by the circuit judge, the witness was then released by the defendant, and examined. He testified to his having had conversations with the plaintiff W. C. Pierrepont. The counsel

Pierrepoint v. Barnard.

for the plaintiff objected to evidence of conversations between the witness and Pierrepoint going to show a license by parol; first, on the ground that nothing but a license in writing was admissible, and secondly, because W. C. Pierrepoint alone could not give such a license, to bind the other executors. The objection was overruled by the judge, and the evidence admitted, on the ground that W. C. Pierrepoint had power to give such license; and that a parol license might be accompanied with other facts claimed by the defendant to exist, so as to render it valid. The counsel for the plaintiff excepted to the decision. The witness then testified that in January, 1843, he was at W. C. Pierrepoint's office, and asked him if he would transfer the endorsement of \$1500 upon the contract for the mill lot, to the contract for lot No. 155. Witness told him he wanted it done for the purpose of cutting timber enough to stock the mill; 5, 6 or 700,000 feet; enough to stock the mill that year, after getting through on the mill lot, upon which they had not then done cutting; that Pierrepoint said he did not know but that would answer, and made the change of the endorsement, then or a few days afterwards; that he said he must have some more money, and witness paid him \$300; which was endorsed on the contract for lot No. 155, February 4th, 1843; that Pierrepoint did not object to witness' going on to cut, but witness could not give his words exactly; that witness supposed Pierrepoint knew of his cutting timber upon lot No. 155; that witness said nothing to Pierrepoint about cutting timber for any other purpose than to stock the mill; that he sold Ferguson a few logs, and made a contract with him for the cutting of timber on that lot; that Ferguson owned a mill, and witness made an arrangement with him to cut some of this lumber for witness, at his (Ferguson's) mill; that after he had sawed a part of the logs the witness sold the whole of them to him; that in the spring of 1843, some spars were cut on the premises, and witness could not say whether Pierrepoint knew this. Other testimony was given, which it is not deemed necessary to refer to. The amount which the plaintiffs were entitled to recover, if any thing, was agreed upon by the counsel for the parties.

Pierrepont v. Barnard.

The judge charged the jury, among other things, that by the terms of the contract no right to cut timber was given to the Messrs. Woodworth without a license in writing, and it was with great doubt and hesitation that he had concluded to hold that any thing short of such written license would give the purchasers of the land any right to cut the timber, or to the lumber when cut and manufactured; but that he had concluded to hold otherwise, and that a parol license by William C. Pierrepont to the Messrs. Woodworth, after the making of the contract to cut timber on the land, upon which they had relied, and on the faith of which they had expended money and made the timber much more valuable in its manufactured state, would protect them in the exercise of that privilege, and that the defendant having purchased the right on executions, had the same rights with reference to the lumber as the Messrs. Woodworth, and no greater. That whenever a vendor of real estate has given an assent to the cutting of timber, and that is clearly proved, and the vendee has relied upon it, and gone on and made expenditures upon the faith of that license, and with the knowledge of the vendor, he should not be permitted afterwards to take any advantage of it by reclaiming the timber in its improved state. That William C. Pierrepont alone, and without the knowledge or assent of his co-executors, might, notwithstanding the terms of the written contract, and the restrictions contained in it in relation to cutting timber, have given a parol license to the Messrs. Woodworth to cut timber, which, if accompanied by the circumstances above mentioned, would protect them in cutting it, and would also afford protection to the defendant. That Pierrepont might, by a parol license, waive or vary the terms of the written contract as aforesaid. That if Pierrepont knew that the Woodworths were engaged in getting timber from the land, in violation of the terms of the contract, and stood by seeing them expend money in getting out and manufacturing the timber, and made no complaint, and did nothing to prevent it, the jury might infer from that, an assent or license to cut timber from the land, and such a license as would afford protection to the Woodworths and

Pierrepont v. Barnard.

the defendant, and prevent the plaintiffs from asserting their title to the lumber thus manufactured. If the jury believed the testimony of Hiram A. Woodworth, although they might believe that he did not prove an absolute and direct license, in terms, to cut timber, yet they were to decide whether, from what took place between Pierrepont and Woodworth, it was not understood by them that the Woodworths were to cut timber for the supply of their mill; and if so, it would afford a protection to the Messrs. Woodworth for the exercise of that privilege in relation to the lumber in question. If, however, the jury believed that Woodworth intended to practice a fraud upon Pierrepont, in procuring a license from him to cut timber, in case they should come to the conclusion that one was given, or if Woodworth afterwards abused that license, by cutting more timber than was wanted for the supply of the mill, or by permitting others to get timber from the land for other purposes than the license contemplated, then Pierrepont had a right to reverse that license at any time, and Woodworth forfeited all right under it. The jury found a verdict for the defendant; and the plaintiffs, upon a case, moved for a new trial.

C. P. Kirkland, for the plaintiffs. I. The parol license to cut timber, as alleged in this case, being equivalent to the conveyance of an interest in real estate, was void by the statute of frauds. If regarded as a sale of personal property, it was equally void under that statute; and this very case most strikingly illustrates the utility and necessity of that statute. (2 R. S. 69, § 6. *Id.* 234, § 1. *Id.* 70, § 3. 1 *Denio*, 550, and cases there cited. 5 *Hill*, 200. 9 *Dowl. Pr. Ca.* 846, 854. 12 *Pick.* 120 to 124.) II. The license, as alleged in this case, was void by the express terms of the contract. (2 R. S. 234, § 1. 13 *Wend.* 71. 10 *Id.* 184. 11 *Id.* 30. 1 *Taunt.* 427. 13 *Wend.* 75, 6. *Cowen & Hill's Notes*, 1480. 4 *Mass. Rep.* 491. 19 *Pick.* 275, 278. 5 *Hill*, 101, 106. 23 *Wend.* 506.) III. It was not competent for W. C. Pierrepont, alone, to give any parol license to affect the interest or title of the plaintiffs, in this property. He had no such power under the will. The license,

Pierrepont v. Barnard.

as alleged, was gratuitous, without consideration, and wholly beyond his power as executor. (17 *Wend.* 136. 23 *Id.* 506. 5 *Hill*, 236. 6 *John.* 39. 21 *Wend.* 178. 1 *Hill*, 111.) IV. The judge erred in admitting any evidence as to a parol license; and more especially the evidence of Woodworth, who was incompetent. (*See cases before cited.*) V. The contract in no manner divested the plaintiffs' title; besides, it was forfeited by the breach of its conditions, by the vendees. (9 *John.* 35, 331, 358. 7 *Cowen*, 229. 23 *Wend.* 506. 17 *Id.* 136.) VI. The charge of the judge was erroneous as to the parol license; and it was in several particulars calculated to mislead. (5 *Wend.* 191, 199. 4 *Id.* 514, 517. 11 *Id.* 83.) VII. If there were any equitable considerations arising from Pierrepont's silence, or from the vendees' acting on the faith of any thing he said or omitted to say, these would not affect the plaintiffs' legal title, but must be enforced in another manner. VIII. There was no sufficient evidence even of a parol license; and the verdict was clearly contrary to, or without, evidence. If there was *any* license, its abuse was clearly proved.

F. Kernan, for the defendant. I. The plaintiffs were *tenants in common* of the premises upon which the timber in question was cut; and as tenant in common William C. Pierrepont had power to give to the Woodworths license to cut timber upon the lot. (*Baker v. Wheeler*, 8 *Wend.* 507.) Even if there had been no contract for the sale of the lot to the Woodworths, such a license would have been valid and would have vested in the Woodworths a good title to the lumber thus cut. II. There is nothing in the contract for sale which would invalidate a subsequent agreement between the parties which is in other respects valid. If a valid license to cut was granted by William C. Pierrepont to the Woodworths subsequent to the contract for sale, such license cannot be rendered invalid by any thing contained in the contract for sale. III. The condition of the contract for sale in relation to the cutting of timber upon the lot was that no timber should be cut without the consent in writing of William C. Pierrepont, (not of the plaintiffs.) If William C.

Pierrepoint v. Barnard.

Pierrepoint, an owner of the property as co-tenant with the other plaintiffs, saw fit subsequently to waive or modify that condition of the contract, (a contract to which he alone was a party with the Woodworths,) such waiver was legal and valid: It is well settled that a written and even a sealed agreement may be modified by parol. (*Dearborn v. Cress*, 7 Cowen, 48.) IV. William C. Pierrepoint having given a parol license to the Woodworths to cut timber upon the lot, and they "on the faith of such license having expended money and made the timber much more valuable in its manufactured state," and William C. Pierrepoint having "stood by seeing them expend money in getting out and manufacturing the lumber and made no complaint," the plaintiffs are now concluded from denying the right of the Woodworths to cut. The acts of William C. Pierrepoint were calculated to influence the conduct of the Woodworths, in a way prejudicial to their interests, unless the parol license to cut is held to be valid, and if so such acts operate as an *estoppel in pais*. This is the view of the question taken by the circuit judge in his charge to the jury: and it is undoubtedly correct. The conduct of William C. Pierrepoint, when Woodworth called upon him to obtain permission to cut, and subsequently, was such as to lead the Woodworths to a line of conduct which must have been prejudicial to their interests if the plaintiffs are to be permitted to retract or repudiate the license given. And this brings the case within the definition of an *estoppel in pais*, as laid down by Judge Nelson in *The Welland Canal Company v. Hathaway*, (8 Wend. 483,) where he says, as a general rule, a party will be concluded from denying his acts or admissions which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter. (*See also Dezell v. Odell*, 3 Hill, 215, where the cases on the subject are reviewed by Justice Bronson.) V. The defendant claiming under the Woodworths, is entitled to insist upon the license and subsequent conduct of William C. Pierrepoint, by way of *estoppel*; to the same extent as the Woodworths might.

Pierrepont v. Barnard.

By the Court, GRIDLEY, J. We think a new trial must be granted, for the errors of the judge upon the trial of the cause; and we will very briefly assign our reasons for this opinion.

The action was trover, for the conversion of a large quantity of pine lumber, which was seized by the defendant and sold upon a judgment against John R. and Hiram Woodworth. The premises on which the timber grew, from which the lumber was manufactured, was known as lot 155 in Richland, in the county of Oswego. This lot was, on the 1st day of August, 1840, contracted by the plaintiffs to be sold to the said Woodworths, at the purchase price of \$5530, payable in several instalments. The agreement for the sale was executed by Wm. C. Pierrepont, by virtue of a power conferred on him by the last will of Hezekiah B. Pierrepont deceased. This contract contained a clause by which the said Woodworths covenanted not to "cut or suffer to be cut, for sale, any timber from the said land, without the consent or approbation of the said party of the first part, or his attorney, first had and obtained in writing." This condition was also expressed in a memorandum endorsed on the contract, of the same date, by which it was agreed that the contract might be renewed if the interest should be kept punctually paid up. No written permission to cut timber was ever given; and we are of the opinion—

I. That the judge erred in admitting evidence of a permission by parol. It is true that a payment was transferred from another contract to this; but that was done at the request, and for the benefit, of the Woodworths.

It will be borne in mind that this action is not *trespass* against the party who cut the timber by the consent of one of the plaintiffs; but an action of *trover*, brought, after notice by the plaintiffs of their claim to the lumber as their *property*, and is founded on a subsequent conversion of it by the defendant. The question, therefore, is whose was the *title* to the *property* in the lumber? The defendant's title is derived under that of the Woodworths, and can be no better than theirs. How then did the *property* in and *title* to, the trees, out of which this lumber was made, pass to the Woodworths? Those trees were

Pierrepont v. Barnard.

real estate, and could not pass, except by an instrument in writing. This proposition was thus established in *Green v. Armstrong*, (1 *Denio*, 550.) And while that case continues to be the law of the land, and the identity of the trees can be traced into the lumber, and the contract has not been performed by the payment of the purchase price, the *title* to the property continues in the original owner, and he may reclaim it in its altered state. We speak of the *legal title* and the rights of the parties *at law*, irrespective of any relief which might be granted by a court of equity, upon an offer to pay the purchase price, in analogy to the relief granted in the case of a parol contract for the sale of land, where the purchaser founds his claim upon a part performance of the agreement. In this class of cases relief is granted in chancery for the reason that none exists at law. So in the case at bar; the *contract* (if indeed there were one resting on a good consideration) is void by the statute of frauds, and conveyed no title to the trees; and any equitable rights which the Woodworths derived from the expenditure of labor on the timber should be asserted in a court of equity, where the court could compel them to *do equity* as the consideration of *receiving* it. Of the application of such a rule the plaintiffs need not complain; for they would gladly relinquish their legal right to the lumber in question, if they could be paid for the land, or if the avails of the lumber should be applied, as in justice they ought to be, to reduce the amount due on the contract of sale. This, it seems to us, would be the conclusion to which the law would bring us, if this parol license were, as it has been argued by counsel, a contract founded on a consideration. But we think it is a parol license, without consideration, which makes the case much stronger against the defendant. Upon the validity and effect of this license, as affected by the statute of frauds, see the case of *Mumford v. Whitney*, (15 *Wend.* 380,) and particularly from page 383 to the end of the opinion, where many of the conflicting cases are ably reviewed.

Again; by the very terms of the written contract, the parol license conferred on the Woodworths no power to cut the timber in question; and this they well knew when they acted un-

Pierrepont v. Barnard.

der it. And this consideration alone removes all just ground of complaint on their part. The admission of evidence of a parol license, defeats the intention of the vendor in requiring it to be in writing. The object of requiring written evidence of a license to cut timber, was to secure the plaintiffs against the consequences of mistakes and frauds and perjuries. The object was the same with that which induced the legislature to enact the statute of frauds itself; and there never was a case which more strikingly illustrates the wisdom of such a provision, than the one now under consideration. In this case, upon parol evidence of the loosest and most unsatisfactory character, the verdict of a jury has left the plaintiffs remediless for a loss of between twelve and fifteen hundred thousand feet of pine timber, constituting the principal value of the lot from which it was taken. Against such a loss they had provided an ample protection in their contract of sale. The plaintiffs foresaw that a parol license might be misunderstood; that if there were important conditions annexed to it, those might be forgotten; and if the license were only extended within particular limits, or as confined to a particular quantity, those limitations might not be borne in mind by a rapacious purchaser; and, in fine, that the most important rights of the owners of the lands, whose value consisted mainly in the timber, might lie at the mercy of mistaken or unscrupulous witnesses, and therefore they imposed the obligation on the purchasers, in the very contract of sale, to cut no timber without a written license. And we think the judge at the circuit erred in depriving them of the advantages secured by this stipulation.

II. But if we are mistaken in this view of the case, and if the ground assumed by the judge at the circuit should be held to be tenable, viz. that if a parol license were given, and relying on it the Woodworths had expended labor and money on the faith of such license, the plaintiff should be estopped from denying it, still upon the facts of this case the plaintiffs were entitled to recover nearly the entire value of the lumber converted by the defendant.

Upon the testimony of Hiram Woodworth it is certainly

Pierrepont v. Barnard.

doubtful whether Mr. Pierrepont ever intended to give him any definite license to cut any timber until an arrearage of some \$300 or \$400 was paid. But at all events there is no pretence for saying that he ever gave any license to cut more than the Woodworths requested, which was limited to a quantity sufficient to stock the mill, and was expressly declared to amount to five or six, or at most seven hundred thousand feet. Now the cutting of any more than the highest estimate thus given was a gross fraud upon the absent owners of the land. Had a request been made to cut double that amount, there is no reason to suppose that the agent would have given his consent. The Woodworths therefore had no right to cut a stick above the estimate presented to Mr. Pierrepont, without a new license. That amount, however, or nearly as much, was cut and sawed into boards, sent to market and sold, before the controversy arose about the timber in question. This timber was cut afterwards, and was over and above the quantity to which the license should be held to apply. The difference, if any, was comparatively small, and the plaintiff was undeniably entitled to recover a sum amounting to near \$2000.

We think the right to this extra quantity of timber may be tested by a resort to the rules of special pleading. To the declaration we will suppose the defendant to have pleaded a parol license to the Woodworths to cut the timber in question, and a sale of the lumber on an execution in favor of the defendant against them. To this plea the plaintiffs would reply, that the parol license was void by the terms of the contract. The defendant must then rejoin, that the Woodworths *acted* on the license and expended money on the faith of it, and therefore the plaintiffs should be estopped from denying it. To this we think the plaintiffs might (irrespective of the question of a departure) successfully surrejoin, either 1st. That as to *this quantity* of timber, there was no license at all, the entire quantity to which the license applied having been previously cut; or, 2dly. That the license was procured by false and fraudulent representations, and was grossly violated and abused afterwards, and was therefore void.

Barnes v. Matteson.

Estoppels are not favored in the law ; and an estoppel *in pais* is never allowed to be used as an instrument of fraud ; but is to be resorted to solely as a means to prevent injustice—always as a shield, but never as a sword.

There are other important considerations which may be urged against the right of the defendant to retain this verdict ; but we have not time to discuss them. We are satisfied, for the reasons we have given, that there should be a new trial. And in granting it we only follow the circuit judge, who himself allowed a new trial, upon a more deliberate examination of the questions involved in the case than he could give during the course of a trial at the circuit.

A new trial is granted ; costs to abide the event.

SAME TERM. *Before the same Justices.*

BARNES vs. MATTESON.

To a declaration in assumpsit the defendant pleaded that under proceedings in bankruptcy, instituted by the plaintiff, a decree had been obtained by which all the plaintiff's property, including the promise in the declaration mentioned, was vested in T. B., the assignee appointed by the court. The plaintiff replied that after the said decree, T. B., the assignee, for a valuable consideration, paid to him by the plaintiff, duly sold, transferred, and assigned to the plaintiff all the right, title, and interest of the assignee to the promises, &c. in the declaration mentioned ; *Held* that the replication was not bad, for want of an averment that the sale and transfer by the assignee to the plaintiff were made in pursuance of an order of the court ; and that a general averment of the sale and transfer was good on general demurrer.

A pleading which sets up two good defences and is therefore double, and which omits to state the time and place when and where the several acts set up in the pleading took place, is bad on demurrer.

DEMURRER to the rejoinder of the defendant to the replication of the plaintiff to the fourth plea of the defendant. The action was assumpsit. The fourth plea alleged that the plain-

Barnes v. Matteson.

tiff, on or about the 8th of February, 1843, presented his petition to the district court of the northern district of New-York, under the act of the 19th of August, 1841, and setting forth substantial parts of the schedule; and that such proceedings were had in the said district court that afterwards, on the 28th of March, 1843, by the consideration and judgment of that court, the said Wheeler Barnes was in due form of law declared and decreed a bankrupt; that by the said judgment all the right, title and interest of the said Wheeler Barnes to the said several supposed promises and undertakings, in the plaintiff's declaration mentioned, became vested in Thomas Beekman, the assignee, under the 62d rule of the court; concluding with a verification. To this plea the plaintiff replied, that after making the said decree, to wit, on the 25th day of August, 1843, the said Thomas Beekman, the assignee mentioned in the said plea, for a valuable consideration paid by the plaintiff, duly sold, assigned, and transferred among other things, the promises and undertakings in the declaration. The replication concluded by praying judgment, &c. To this replication the defendant rejoined that the said Wheeler Barnes presented a schedule annexed to his petition, which he swore was an accurate inventory of his property, rights and credits, of every name or nature, and the situation of each and every parcel and portion; that the said Wheeler Barnes knowingly, falsely and fraudulently, and with the intention of defrauding his creditors and of becoming the purchaser of the property, rights and credits himself, inventoried in his schedule a large number of debts of less amount than were due to him; that he inventoried debts which were good and collectable as insolvent and worthless; and the rejoinder set forth several demands, particularly; and alleged that the plaintiff falsely stated to the assignee that the debts inventoried were not collectable, with the intention to purchase them himself, and that there was no valid sale, assignment, or transfer from the said assignee to the said plaintiff for a valuable consideration. To that rejoinder the plaintiff demurred and assigned several special causes of demurrer; and the defendant joined in demurrer.

Barnes v. Matteson.

W. Barnes, plaintiff, in person.

A. Bennett, for the defendant.

By the Court, GRIDLEY, J. The plaintiff claimed to recover in his declaration, for use and occupation and on several other grounds of indebtedness. The plea set forth the proceedings of the plaintiff in bankruptcy, with a decree by which all his property, including the promises in the declaration mentioned, was vested in Thomas Beekman, the assignee appointed by the court. The plaintiff replied, that after the said decree the said assignee, for a valuable consideration paid to him by the plaintiff, duly sold, transferred and assigned to the said plaintiff all the right, title and interest of the said assignee to the promises and causes of action in the declaration mentioned. To this replication the defendant rejoined several matters, and to the rejoinder the plaintiff demurred, and assigned many special grounds of demurrer.

The defendant's counsel now insists that the replication of the plaintiff is bad in substance, and that the judgment, for that reason, must pass against him, on the ground that he committed the first fault in pleading. The objection to the replication, on which the defendant relies, is the absence of any averment that the sale and transfer of the demands which constitute the subject matter of the suit, by the assignee to the plaintiff, were made in pursuance of an order of the court. The assignment is founded on the provisions of the third section of the bankrupt act. In that section it is enacted that "the assignee so appointed shall be vested with all the right, title, power and authority to sell, manage and dispose of the same, [the property of the bankrupt,] and to sue for, and defend the same, *subject to the order and direction of the said court*, as fully and to all intents and purposes as the same were vested in and might be exercised by the bankrupt before or at the time of his bankruptcy." The proposition for which the defendant contends is, that the pleader should have set out the order of the court authorizing the sale and transfer, and then have stated, by an appropriate

Barnes v. Matteson.

avermment, such facts as would show the sale and transfer to have been made in pursuance of such order. I cannot think such an averment necessary. The assignee was vested with full power "*to sell and dispose of*" the demands which constitute the cause of action in the suit; and the only restriction imposed upon him is that in so doing he, as an officer of the court, shall be subject to the orders of the court. Now the consequence of a violation of this provision would be that any person, whose rights should be affected thereby, might have his appropriate relief, by setting aside the sale or otherwise. But there is nothing in the act to show that any special order is to be made regulating and directing such sales, either generally or in each particular case. It does not appear that any such order has been made in this case, and much less that, if made, it has been violated. If any such fact exists, it must at least be pleaded. The general averment of the sale and transfer is good on a general demurrer.

This brings us to the consideration of the rejoinder. It has hardly been contended that it could be supported. It certainly cannot on a special demurrer. Its defects in form are numerous. It seeks to raise an issue, whether the assignment is valid in law, without setting forth the facts on which its invalidity depends. This is a good defence if well pleaded. Again; it avers what is intended to be a fraudulent concealment of certain debts due to the plaintiff, to show the discharge void under the fourth section of the bankrupt act. This is also a good defence, if well pleaded. But the facts are not so pleaded as to amount to a fraud under that section. The pleading is therefore double. Another defect in form is an omission of any statement of the time and place, showing when and where the several acts set up in the pleading took place.

The demurrer must therefore be allowed, and the defendant may amend on payment of costs.

SAME TERM. *Before the same Justices*

HOUGHTALING and others vs. HOUGHTALING.

Where, in an action of trespass *quare clausum fregit*, the plaintiff complains not only of injury done to his land, but that his dwelling house was also destroyed, and the cause is tried upon a plea of title, and there is a verdict against the defendants, the plaintiff cannot, on a writ of error, insist that the dwelling house was personal property, and that trespass would lie against the defendants, for its destruction.

In such case the gist of the action is the injury to the land; the additional allegation that the plaintiff's dwelling house was destroyed, being merely matter of aggravation. And unless the evidence sustains the charge of injury to the land, the plaintiff is not entitled to recover.

In a cause commenced in a justice's court, and removed to the common pleas, by plea of title to land, the plaintiff's proof must be confined to his declaration.

A parol licence to do an act upon the land of another, which act may affect the owner in the exclusive use of his land, is creating an interest in the land, and is therefore within the statute of frauds, and void.

ERROR to the Onondaga common pleas. The action was trespass, originally commenced before a justice of the peace, but was discontinued there, in consequence of the defendants' pleading not guilty, and giving notice of title to the land in question. The cause was thereupon removed to the common pleas, and the plaintiff declared in trespass *quare clausum fregit*, for breaking and entering a certain close and dwelling house of the plaintiff situate in the town of La Fayette. The defendants pleaded the general issue, and gave notice that the *locus in quo*, with the appurtenances, was, at the time when, &c. the soil and freehold of the defendant Jane Houghtaling, and that the said dwelling house was attached to and was a permanent fixture upon said close and freehold, and formed a part thereof; and that the said dwelling house was the property of the said Jane, and was, together with said close, in her possession at the said time when, &c. And that she broke and entered the said close and dwelling as her own house and property, as she lawfully might for the cause aforesaid; and that the other defendants, James, John, and Stephen Houghtaling

Houghtaling v. Houghtaling.

by her command and as her servants, did the acts whereof the plaintiff in his declaration had complained ; as they lawfully might. On the trial it was proved that the house was built by the plaintiff ; that the defendant Jane Houghtaling was in the possession of the farm on which the house stood, when the building was torn down, and that the other defendants were her sons. That John Houghtaling deceased was the husband of the said Jane and the father of the other defendants, and of the plaintiff Henry Houghtaling ; and that he occupied the farm at the time of his death. It was also proved by the plaintiff that the dwelling house was torn down by the defendants, John, James, and Stephen Houghtaling, in the presence and by the direction of their mother. The counsel for the defendant offered and read in evidence the record of a deed executed by Joshua Forman to John Houghtaling, on the 12th of May, 1807, embracing the land on which the house stood. He also offered in evidence, proceedings had before the first judge of Onondaga county in 1841, on the application of Jane Houghtaling, to remove James Alcott as her tenant, from the premises. But the evidence was objected to, by the plaintiffs' counsel, and the objection was sustained. The will of John Houghtaling was then read in evidence. By this will, the testator devised and bequeathed all his real and personal estate to his wife Jane, during her life, or until she should marry, and then to his children in equal shares. The will was dated June 12th, 1840, and the testator died a few days afterwards. The counsel for the plaintiff offered to prove the declarations of the said John Houghtaling deceased, made in his lifetime, that he gave the plaintiff license to build the house, and occupy it until he got ready to move it off. This evidence was objected to, on the ground that the declarations of the said John were inadmissible to prove title in the plaintiff, to the house in question ; and that a parol license to erect said house, with the privilege of taking it away, was void. The court overruled the objection, and permitted the evidence to be given, and the defendants' counsel excepted. The witness then testified that on the day the house was put up, John Houghtaling told him he had given

Houghtaling v. Houghtaling.

Henry (the plaintiff) a right to build a house there, and occupy it as long as he had a mind to. He told another witness, after the house was built, and while Alcott was in possession of it, that Alcott paid him no rent; as the house belonged to the plaintiff. Joel Houghtaling, a brother of the plaintiff, testified that he heard the agreement between his father and the plaintiff; that the plaintiff had taken his father's saw mill to tend, and had no house to live in; that he asked his father if he might build the house there; who told him he might, and went on and helped him build it; that it was built for the use of the mill, and when the plaintiff left the mill, the house was to be his father's. Alcott testified that while he occupied the house, he paid rent to the plaintiff; that he never paid any rent to the plaintiff's father. The court charged the jury that a parol license to erect a house on another man's land, acted upon, was good; and that if the facts in this cause supported that view of the case, the license would not be void, but would be good; that if the jury believed the plaintiff had an indefinite license to erect and occupy said house, then he had a right to the possession of the premises; and if he was in the actual possession thereof at the time the house was torn down, he could sustain an action against those who failed to show a better right. The counsel for the defendants excepted to this charge. The jury found a verdict for the plaintiff for \$25; and judgment was rendered by the common pleas for that amount.

D. Gott, for the plaintiffs in error.

H. P. Winsor, for the defendant in error.

By the Court, PRATT, P. J. This was an action commenced in a justice's court and removed from that court to the court of common pleas by plea of title to land. The declaration in the court below was trespass *quare clausum fregit*; and a plea of title having been put in by the defendants, the cause was tried upon that issue. It is now insisted on the part of the plaintiff below that the house was personal property, and that trespass would lie against the defendants for its destruction.

Houghtaling v. Houghtaling.

Perhaps the evidence was sufficient to establish that fact; but that was not the issue to be tried in the court below. The plaintiff complained of injury to his land; and the additional allegation that his personal property was destroyed was merely matter of aggravation. The gist of the action was the injury to the land; and unless the evidence sustained that allegation the plaintiff was not entitled to recover. (*Howe v. Wilson*, 1 Denio, 181. *Rickets v. Solway*, 2 Barn. & Ald. 363. 1 H. Black. 555. 4 Pick. 239.)

In a cause commenced in a justice's court and removed to the common pleas by plea of title to land, the plaintiff's proof should be confined to his declaration. If the plaintiff should be allowed to abandon his allegation of injury to land, and try an issue of injury to personal property, the defendant would lose his costs, although he should succeed in obtaining a verdict; or if the plaintiff should succeed, he would get the benefit of the defendant's bond, although if he had counted on such injury in the first instance the plea of title would not have been interposed, and no bond would have been necessary. We think the verdict cannot be sustained upon that ground.

The main question then is, whether the plaintiff below proved such an interest in the land as would enable him to maintain trespass against the general owner of the fee. This depends upon the question whether a parol license to build upon the land of another, and to occupy it indefinitely, is revocable. And upon this also depends the question whether the court erred in admitting the declarations of John Houghtaling, made in his lifetime. The admissions of a former owner of land in possession are good against those claiming under him only to prove facts which may be established by parol. If a parol license to build upon and occupy the land of another is, when executed, irrevocable, there is no reason why it may not be proved by parol admissions, or any other parol evidence; but when a title cannot be created by parol, parol admissions of the existence of such title are not admissible.

To return, then, to the main question. Upon examining the statute of frauds, (2 R. S. 151,) there does not seem to be room

Houghtaling v. Houghtaling.

for a doubt that a parol license to build upon, and occupy, the land of another indefinitely, is absolutely void and confers no title whatever. Any other construction of the statute would render it nugatory. The grand remedial benefit derived therefrom, to wit, the prevention of frauds and perjuries, would be lost. In the case under consideration, without questioning the credibility of the witnesses, we cannot fail to see how easily, by a slight change of the language of the ancestor, a permission to erect a temporary house, for a temporary purpose, might be converted into a license to build and occupy indefinitely, and thus create an estate scarcely less than a fee. Yet, as plain as the language of the statute is, that no estate in land can be created by parol, there are cases both in England and this country which seem to favor a contrary doctrine.

We may pass by those cases cited by the plaintiffs' counsel which hold that a license to do a particular act, or a series of acts, upon the land of another, without creating or affecting the interest in the land itself—such as a license to hunt—may be good by parol; (*Taylor v. Waters*, 7 Taunt. 374; 15 Wend. 392,) and also those cases which hold that a license to do an act on one's own land, which may affect injuriously the air or light of another, cannot, when executed, be revoked; at least without the payment of all expenses. (*Webb v. Paternoster*, Palmer, 71. *Winter v. Brockwell*, 8 East, 308. 4 Serg. & Rawle, 241. 7 Bing. 682.) There are some peculiar circumstances in these cases which may well control the decisions of the courts. But there are other cases which go much farther, and hold doctrines in the teeth of the statute; such as *Wood v. Lake*, (Sayre, 3,) where it was held that a parol license to stack coals on the land of another, for seven years, did not create an interest in the land, and was therefore valid; or *Ricker v. Kelly*, (Greenl. R. 117,) where it was held that a license to build a bridge on another's land was good; or *Clement v. Durgin*, (5 Greenl. 9, 13,) where the same was held in relation to building a dam. (See also 7 Taunt. 374; 4 Mees. & Welsb. 538; 1 How. 405.)

But these cases are excrescences upon the law, and are com-

Houghtaling v. Houghtaling.

pletely repudiated, both in England and in this state. Sugden and Chitty both review all the cases with great ability, and show clearly that they are in direct opposition to the statute of frauds. (1 *Sugden on Vendors*, 91. 1 *Chitty's Gen. Practice*, 336 to 340. . See also 4 *East*, 108 ; 5 *B. & C.* 221 ; 8 *Id.* 288 ; 11 *Mass. Rep.* 536 ; 3 *Kent's Com.* 451 ; *Miller v. Auburn & Syracuse R. R. Company*, 6 *Hill*, 62 ; *Mumford v. Whitney*, 15 *Wend.* 380 ; *Luce v. Carley*, 24 *Id.* 451 ; 10 *Conn. Rep.* 375.) These authorities establish the rule in accordance with common sense and right reason. They hold that a parol license to do an act upon the land of another, which may affect that other in the exclusive use of his land, is creating an interest in the land, and is therefore within the statute of frauds and void.

But were we, in this case, to adopt the contrary position, and hold that it did not create an interest in the land, the plaintiff would still fail on the first ground ; for, in that case, he would have no interest or title to be trespassed upon, and an action for breaking his close cannot be sustained. He has taken issue with the defendants upon his title to the land, and if he should succeed in showing that a license to build and occupy indefinitely did not create an interest in the land, he overthrows the foundation of his own action.

It is said that, at all events, the plaintiff was a tenant at will, and could not be put out of possession until a month's notice to quit had been given. How this might have been had the plaintiff continued in possession it is not necessary to decide. By the proceedings before Judge Lawrence, had they been admitted in evidence, the defendants might have shown that the defendant Jane had actually obtained possession ; in fact that did appear by the evidence, and it was not necessary to give the plaintiff, when he was actually out of possession, notice not to enter. Again ; the proceedings before Judge Lawrence were proper evidence to show an actual revocation of the license, and should therefore have been admitted.

The judgment of the common pleas must be reversed, and a venire *de novo* be awarded.

SAME TERM. *Before the same Justices.*

ROWE vs. RICHARDSON and others.

In order to give a sheriff a cause of action upon the official bond of his deputy, there must not only be a technical breach of duty, on the part of the deputy, but such a breach of duty as to occasion pecuniary damage to the plaintiff.

The bail of a deputy sheriff are only responsible for his official acts as a general deputy. They are not liable for a want of courtesy on the part of the deputy, towards his principal, nor for an act which may be annoying, or even troublesome to the sheriff, so long as his conduct is strictly in accordance with his duty as a public officer.

A sheriff cannot maintain an action upon the bond of his deputy, for the act of the latter in levying upon, and selling, under and by virtue of a junior execution, property upon which the sheriff had previously levied, by virtue of a prior execution against the same defendant.

If a sheriff, having two executions against the same person, sells on the junior one, the sale is valid. But the sheriff is bound to pay over the proceeds of the sale to the plaintiff in the prior execution.

And if the sale is made by a deputy of the sheriff, and he refuses to apply the proceeds upon the prior execution, or to pay them over to the sheriff, to be thus applied by him, such refusal is a breach of the condition of the deputy's official bond; the liability of the sheriff being a legal consequence of the default of such deputy.

DEMURRER to the plaintiff's declaration. The action was debt, brought by the plaintiff as late sheriff of Oswego county, upon a bond given to the plaintiff by the defendant Richardson and the other defendants as his sureties, upon Richardson's being appointed by the plaintiff deputy sheriff. The condition of the bond was that Richardson should well and faithfully discharge the duties devolving on him by virtue of the said appointment, and should indemnify the plaintiff, and save him harmless from all loss, damages, costs and charges, &c. to which he might be put by, from, or in consequence of any acts done or committed by Richardson, or omitted to be done by him as such deputy sheriff. The first breach assigned was that on the 21st of January, 1841, a fi. fa. was issued out of the supreme court in favor of James D. Fisher and William Martin against one Evert Van Epps, and directed to the sheriff of the county of Oswego, and delivered to the plaintiff as such sheriff; which

Rowe v. Richardson.

writ was tested the first Monday of January, 1841, commanding said sheriff to levy \$297,65 of the goods and chattels of said Van Epps in the said county of Oswego, to satisfy a judgment recovered in that court by Fisher and Martin against Van Epps. The execution was returnable on the first Monday of May then next, and on it was endorsed a direction to "levy for and collect \$297,65, with interest from 18 Jan. 1841, till paid, besides sheriff's fees and poundage." That by virtue of said writ the plaintiff, by Richard D. Hubbard his deputy, levied on and seized, in his said county, divers goods and chattels of Van Epps, specifying them, of the value of \$400 and abundantly sufficient to satisfy the said execution, which levy was made before the return day of the execution, to wit, on the 22d of January, 1841. By virtue of which writ and levy the plaintiff became liable for the goods, and the avails thereof, to satisfy such execution. That on the 15th of December, 1841, the plaintiff being yet sheriff, holding the writ aforesaid, and the said levy made on the goods and chattels of Van Epps being yet in full force, and unsatisfied, and the plaintiff, as such sheriff, being held responsible for the goods so levied on, another writ of fi. fa. was issued out of the Oswego common pleas, in favor of John C. Van Epps, against the said Evert Van Epps, which was directed to the sheriff of the county of Oswego and delivered to the defendant Richardson as deputy sheriff; by which writ the sheriff was commanded that of the goods and chattels of the said Van Epps in said county, he cause to be made \$465,65, to satisfy a judgment recovered in that court by John C. Van Epps against the said Evert Van Epps, and that he have that money before such court on the second Monday of December, 1841. Said writ was tested the 3d Monday of September, 1841, and a direction was endorsed on the back, to levy \$465,65, with interest from Dec. 2, 1841, besides the sheriff's fees. That Richardson, after he as such deputy received the said writ, and before the return day thereof, and well knowing the facts of the former execution in the hands of the sheriff, and of the levy upon the goods and chattels of Van Epps, and of the responsibility of the sheriff and of his liabilities touching

Rowe v. Richardson.

the same, levied, advertised, and sold the said goods and chattels of Van Epps, under and by virtue of the said last mentioned writ. That at the time and before the sale of such goods and chattels, by Richardson, he was expressly informed by the plaintiff, to wit, by said Hubbard his deputy, of the said former execution, and the levy made under and by virtue thereof, and that such goods and chattels were in fact then advertised for sale on the prior execution, by the said Hubbard, and Richardson was then and there required by Hubbard to desist and refrain from such sale, and to postpone the same until after the sale under the prior execution had taken place; and the plaintiff also gave notice and demanded of Richardson that if he persisted in selling such goods and chattels, he should apply the avails thereof to the payment and satisfaction of the former execution for the indemnity of the plaintiff. That the defendant Richardson, well knowing the premises, and the rights and responsibilities of the plaintiff, and being also informed of his own duty as a deputy sheriff, by said Hubbard, and in fact forbid selling such goods and chattels, or in any way disposing of, or intermeddling with them, except to apply the avails to the satisfaction of the former execution, and regardless of his duties as deputy sheriff, and the condition of his bond, did, on the 15th of January, 1841, sell the said goods and chattels at public auction and deliver the same to the purchasers, who immediately removed the same out of the county, and the sheriff was wholly deprived of the benefit thereof to satisfy the former judgment and execution. And the plaintiff, by said Hubbard his deputy, was obliged to return the said execution unsatisfied. That Richardson, at the time, and since, such sale and disposition of the goods by him, although often requested, has wholly neglected and refused to make the money from the said property and to apply the avails thereof, or of the said sale, to the payment and satisfaction of the execution in favor of Fisher and Martin, or to pay the same or any part thereof, to the plaintiff, to enable him to apply and pay the same to the said Fisher and Martin; and that the defendant Richardson had refused to render to the plaintiff any account of the avails of such goods

Rowe v. Richardson.

and chattels, &c. but on the contrary thereof had wholly neglected to collect any of the moneys arising from the sale so made by him, or to return the execution; and that he had wholly failed well and faithfully to discharge the duties devolving on him as such deputy sheriff, and although often requested so to do, had entirely failed well and truly to indemnify the plaintiff and save him harmless from all damages, costs and charges he had been put to and obliged to pay and suffer, in consequence of the acts done or committed by the said Richardson, or omitted to be done by him as such deputy sheriff in the sale and disposition of the said property, and the total neglect to make or collect the money from the avails of the said sale, or the value of the said goods, or any part thereof, and apply the same to the payment and satisfaction of such former execution. By reason whereof the plaintiff had been put to great trouble and expense, and had been forced and obliged necessarily to pay out of his own funds the amount of Fisher and Martin's execution, and to lay out and expend divers large sums of money, to wit, \$2000, in consequence of the neglect of Richardson to perform the duties of deputy sheriff so as to save the plaintiff harmless touching the business done by Richardson as his deputy.

The second breach assigned, was that by reason of the sale and disposition of the said goods and chattels of the said Evert Van Epps by Richardson, the plaintiff, by said Hubbard, his deputy, was under the necessity to return the prior execution unsatisfied, and that the said goods and chattels had been sold on another execution. That Van Epps was not, at the time of the levy by Hubbard, nor at any time afterwards, possessed of any personal property, other than that levied on, nor of any real estate or chattels real in the said county, to satisfy the execution in his hands, or any part thereof. And that in consequence of the sale of the property, the plaintiff became liable and was, by the said Fisher and Martin, held responsible for the amount of their execution. That in July, 1844, Fisher and Martin recovered a judgment in the supreme court against the plaintiff for the amount of the judgment and execution in their

Rowe v. Richardson.

favor against Van Epps, and the costs of suit. That the plaintiff defended the action and made use of the proper and legal defence thereto; and was put to great trouble and expense therein, to a very large amount, to wit, the sum of \$10,000 over and above the said judgment in favor of Fisher and Martin against Van Epps. And the plaintiff averred that the damage, costs and charges, trouble and expense to which he had been put by and in consequence of the acts done or omitted (improperly) to be done by the said Richardson as such deputy sheriff, amounted to a large sum, to wit, \$10,000, &c.

To the whole of this declaration the defendant demurred specially, assigning several causes of demurrer.

D. H. Marsh, for the plaintiff.

R. H. Tyler, for the defendant.

By the Court, PRATT, P. J. There are two questions presented by the demurrer in this cause. First. Whether there is a substantial breach of the condition of the bond assigned in the plaintiff's declaration; and Secondly, Whether, if there be a substantial breach assigned, such assignment is defective in form.

The declaration is very unskillfully drawn; and it is somewhat difficult to determine which of the numerous allegations in the declaration the pleader relied on, as constituting a breach of the condition of the bond. In order to give the plaintiff a cause of action, there must not only be a technical breach of duty on the part of the deputy, but it must be such a breach of duty, as to occasion pecuniary damage to the plaintiff. The object of the bond is clearly to indemnify the sheriff against damage or liability in consequence of his deputy's neglect of duty. And however gross may be his derelictions, his bail, we apprehend, are not liable, unless the sheriff has been damaged or been made legally liable in consequence of such dereliction. (*Hughes v. Smith*, 5 John. 168.)

Again; we conceive it to be a clear proposition that the bail

Rowe v. Richardson.

of a deputy sheriff are only responsible for his official acts as a general deputy. They are not responsible for a want of courtesy on the part of the deputy, towards his principal, nor for an act which may be annoying or even troublesome to the sheriff, so long as his conduct is strictly in accordance with his duty as a public officer. (*Tuttle v. Cook*, 15 *Wend.* 274. 6 *Barn. & Cress.* 739. *Bacon's Abr. tit. Sheriff, H. sub. 2.*)

In this case, a *fi. fa.* issued to the sheriff, came into the hands of Richardson, his deputy, to be executed. He levied upon the property of Van Epps, the defendant in the execution, and advertised and sold the same. Thus far, we are unable to discover any breach of duty on his part, as a public officer. He followed the directions contained in the process, and for thus doing it is difficult to perceive wherein he has done wrong as a general deputy. It is alleged in the declaration that an older execution was in the hands of the sheriff, which had been previously levied upon the same property and upon which the property ought to have been sold. In answer to this allegation, if the property ought to have been sold upon the prior execution, we are unable to perceive any good reason why the sheriff did not take it into his own exclusive possession and sell it. The property was in his legal custody, and under his control, by virtue of the prior levy; nay, for that matter, it was in his custody, by virtue of Richardson's levy. He was therefore under no legal compulsion to deliver it over to Richardson; or if the latter got possession of it without his knowledge, the sheriff might retake it. He surely had the power, legally and physically, to control it; and he ought not to be allowed to stand still and see his authority set at defiance by his deputy, and then bring an action against his bail for damages. If the deputy insisted on controlling the property, the sheriff could have removed him, and settled the controversy at once. Thus far, then, we are of opinion that the deputy was guilty of no breach of official duty as a public officer, and that his conduct was not such as to impose any liability upon his bail.

But there is an additional allegation, that the deputy did not make any money on the sale, or if he did that he has neglected

Rowe v. Richardson.

and refused to account with the plaintiff for the same. Whether that constitutes a breach of the condition of the bond, for which an action can be sustained, depends upon this question of law. Was the sheriff bound, or had he the right to apply the proceeds of the sale upon the prior execution? For the plaintiff must show not only the misconduct of the deputy, but that he has been made legally liable for such misconduct, or has been mulcted in damages therefor. It does not appear that the sheriff has suffered any damages for any negligence in regard to the second execution. It therefore would seem to follow that unless he was authorized to apply the proceeds of the sale on the prior execution, the damage which the plaintiff has sustained, was not in consequence of the failure of the deputy to account for the proceeds of the sale, but rather in consequence of the sale itself which the sheriff had the power to prevent; and he ought to have prevented it.

It becomes material to inquire therefore whether the plaintiff could legally have made that application. This question is not entirely free from difficulty. In the case of *Rybalt v. Peckham*, cited in *Hutchinson v. Johnston*, (1 T. R. 729,) it seems to have been held that when two executions against the same defendant are delivered to the sheriff at different times and he sells upon the last execution, he is bound to apply the proceeds upon that execution, although the sheriff will be liable to the plaintiff in the first execution for the amount. The case is not reported at length, but a note of the decision to that effect is given. This decision was approved by Nelson, Ch. J. in the case of *Fenton v. Folger*, (21 Wend. 676,) but the point was not necessarily raised. (See also *Sandford v. Roosa*, 12 John. 162; 1 Lord Raymond, 251.)

But in the case of *Russell v. Gibbs*, (5 Cowen, 390,) the very opposite was held. In that case an execution came into the hands of one deputy who levied upon a mare of the defendant. After the return day of that execution, another execution came into the hands of another deputy of the same sheriff, which was levied upon the property of the defendant therein, except the mare in question, which had been removed out of the

Rowe v. Richardson.

county into the state of Vermont, before the receipt of the execution. The property was advertised for sale and was sold under the last execution, together with the mare in question, which had been returned the day before the sale. Russell, who owned the judgment upon which the former execution issued, bid off the mare. The sheriff insisting that the proceeds of the sale should apply on the execution upon which the property was sold, brought his action against Russell for the price. The court held that the property being in the sheriff's hands by the levy on the first execution, the sale under the last execution was regular; but that the sheriff was bound to apply the proceeds upon the first execution. If this decision is good law it is decisive of the question. The sale under the last execution, in the case at bar, was undoubtedly good to pass the title. (21 *Wend.* 676. *Gra. Pr.* 384. 4 *Cowen*, 461.)

The sheriff therefore could not seize and sell the property again. The levy upon the property by virtue of the prior execution was pro tanto a satisfaction of it. If the sheriff could not apply the proceeds of the sale upon that execution, the same property might have the effect, as to the defendant, to satisfy both executions, although it was only sufficient in value to satisfy one. We can see no good reason why a rule should be adopted which might work such manifest injustice. Each deputy represents the sheriff, and is in contemplation of law, as to others, the sheriff himself. The legal rights of the parties to the execution are the same as if the sheriff had held both executions, and had in person made the levy and sale. In such case it cannot be doubted that this court, upon application, would have compelled him to pay over the proceeds to the plaintiff in the first execution. If we are right in this view then it follows that the liability of the sheriff was a legal consequence of the default of the deputy Richardson, in not paying over the money made on such sale, and not of the act of selling. The sheriff could not maintain an action against Hubbard, but must seek his remedy against Richardson, or nowhere.

Thus much upon the merits. It still remains to consider

Bucklin v. Ford.

whether the facts set out in the assignment of breaches are sufficient to give the plaintiff a cause of action, and if either of the assignments is good, the demurrer being to the whole declaration, the plaintiff is entitled to judgment.

First. The second execution is alleged to have been delivered to Richardson on the fifteenth day of December, and it is alleged to have been returnable on the second Monday of the same month. The execution, therefore, would seem not to have been delivered to the defendant Richardson until after the return day, and Richardson, in meddling with the property, was a mere trespasser. He was not acting under his process, and his bail ought not therefore to be made liable.

Secondly. The first assignment is uncertain, containing many allegations repugnant to each other and exhibiting any thing but skill on the part of the pleader.

Thirdly. The second assignment alleges as misconduct on the part of Richardson, only the sale of the property. We have shown above that there was no misconduct in the sale alone. The same difficulty in relation to issuing the execution applies to this assignment as well as to the other.

We think both assignments are therefore bad in form. There must be judgment for the defendant on the demurrer, with leave to amend.

SAME TERM. *C. Gray, Pratt, Gridley, and Allen, Justices.*

BUCKLIN, adm'r, &c. vs. FORD, executor, &c.

No exception to the statute of limitations can be claimed, unless it is expressly mentioned in the statute.

The statute of limitations begins to operate only from the time a right to demand the thing in question vests in some one. A cause of action cannot be said to "accrue" within the terms of the statute, until there is some person in existence capable of suing, or at least some person to whom, or against whom, it may accrue.

5	398
130a	14
5	398
64h	56
5	393
74h	296
5	393
78h	307
5b	393
9ap	347
9ap	350
5b	393
22ap	522

Bucklin v. Ford.

Accordingly, where A. received property belonging to B., after B.'s death, and C. took out letters of administration, and brought his action against the executor of A., who pleaded the statute of limitations; *Held* that the statute only commenced running from the granting of letters of administration, and not from the receipt of the property; and that it was sufficient if the action was brought within six years after the granting of letters of administration.

MOTION to set aside report of a referee. The action was *assumpsit*, brought by the plaintiff as administrator of John Bucklin, jun. deceased, against the defendant as executor of John Bucklin, senior, deceased. The first count of the declaration was for taking and converting goods, chattels, and things in action, bills, bonds, promissory notes, judgments, mortgages, &c., belonging to the plaintiff's intestate, of the value of \$2000: with an allegation of a promise to pay the amount. To this was added the common counts. The defendant pleaded the general issue, and gave notice that he would insist upon the statute of limitations, as a bar to the plaintiff's action. The defendant also gave notice of set-off. It appeared from the evidence on the hearing before the referee, that the plaintiff's intestate died in January, 1828, and that soon afterwards the property for which this action was brought, came into the hands of John Bucklin, senior, the defendant's testator. John Bucklin, senior, died in December, 1838. Letters of administration upon the estate of John Bucklin, jun. were granted to the plaintiff on the 4th of November, 1836; and this suit was commenced in April 1842. The referee reported \$1760 due to the plaintiff from the defendant; and the defendant moved to set aside his report.

C. A. Benton, for the plaintiff.

F. Kernan, for the defendant.

By the Court, PRATT, J. The only question raised upon the argument in this cause was in relation to the statute of limitations. It is undoubtedly a well settled proposition that no exception to the statute of limitations can be claimed, unless

Bucklin v. Ford.

it is expressly mentioned in such statute. "General words of a statute, it is considered, must receive a general construction, and unless there can be found in the statute itself some ground of restraining it, it cannot be restrained by arbitrary addition or retrenchment." (*Angell on Limitations*, 144. *Bickford v. Wade*, 11 *Vesey*, 86.)

But a more grave question arises in this case; and that is whether a case of this kind comes within the terms of the statute. Our statute requires all actions of this description to be commenced within six years after the cause of action accrues; and is in this respect, substantially the same as the English statute of 21 *Jac. 1st.* Can a cause of action, then, be said to accrue, or exist, unless there be some person in existence capable of suing, or at least some person to whom, or against whom, it may accrue? It seems to be settled that it cannot.

In *Curry v. Stephenson*, (*Skinner*, 555, *pl. 3*, cited also in *Salk.* 422, and 4 *Mod.* 376,) it was held that where A. received money belonging to B., after his death, and C. took out letters of administration and brought his action against A., who pleaded the statute of limitations, the statute only commenced running from the granting of letters of administration, and not from the receipt of the money. "That the statute begins to operate only, from the time a right to demand the thing in question vests in some one." So in the case of *Murray v. The East India Company*, (5 *Barn. & Ald.* 204,) the same principle was decided. That was a bill of exchange drawn payable to one Hope, and accepted by the defendants, the drawees, after Hope's death. Murray, as administrator of Hope, brought his action, to which the statute of limitations was pleaded. It was insisted by the plaintiff that the statute only commenced running from the granting of letters of administration. Upon the other side it was insisted that it commenced from the day of payment mentioned in the bill. The court of king's bench held that the statute only run from the time of granting letters of administration. The court said "a cause of action cannot be said to exist unless there be some person in existence capa-

Bucklin v. Ford.

ble of suing." The same principle has also been established in cases where actions have been brought against executors and administrators. In *Douglass v. Forrest*, (4 Bing. 686,) the same question arose where the statute was pleaded by the executors or administrators. The court held that a cause of action is the right to prosecute a cause to effect. No one has a complete cause of action until there is somebody that he can sue. (See also *Joliffe v. Pelt*, 2 *Vernon*, 694.)

We can find no case where the question has been directly passed upon by the courts of this state; but the principle is expressly recognized by Nelson, Ch. J. in *Wenman v. Mohawk Ins. Co.* (13 *Wend.* 267.) He says, "there are cases where the cause of action accrued after the death of the testator or intestate, in which it has been repeatedly held that the statute did not begin to run until probate or letters of administration." The same principle has been repeatedly decided in the courts of our sister states. In *Fishwick v. Sewall*, (4 *Harr. & John. Rep.* 393,) it was held that where A. died in 1765, possessed of a slave, and in 1812 B. was appointed administrator and brought trover against the person in possession of the slave, the statute of limitations was no bar. So also in *Johnson v. Wren*, (3 *Stew.* 172,) it was held that the statute does not commence running until some one is entitled to sue. (See also 4 *McCord*, 423; *Harper*, 135; 3 *Bibb*, 537; 15 *Conn. Rep.* 145; 2 *Iredell*, 440; 8 *Barn. & Cress.* 277; *Stanford's case*, cited in *Saffin's case*, *Croke's Jac.* 60, 61; 6 *Bac. Ab.* 393, *tit. Lim. of Actions*, E. 5; 4 *Wharton*, 130; 9 *Leigh*, 79; *Rice's Eq. Rep.* 199; *Angell on Lim.* 144; 10 *Ves.* 93.)

It is conceded that when the statute begins to run no subsequent disability, except in those cases provided for in the statute itself, will prevent or delay its operation, even when the courts are shut and there is no forum in which to commence an action. (6 *Bac. Ab.* 395, *tit. Lim. of Actions*, E. 5.) Nor will an injunction prevent it; (16 *Wend.* 572;) nor will it be prevented if the fraud or negligence upon which the action is based was not discovered. (20 *John.* 33; 6 *Cowen*, 238.) The

Bucklin v. Ford.

revised statutes of this state, however, provide for some of the above cases.

But the difficulty in this case is that the cause of action did not accrue until the letters of administration were granted, until there was some one in existence to whom and from whom the debt was due, or who had a right to demand the thing, and from whom it might have been demanded. Those excepted cases in the statute are cases where the right of action accrues, but from some disability the persons interested are unable to enforce it, or from some principle of public policy the law will not hold the party responsible for the neglect. Such are the cases of infants, married women, and persons beyond the seas. The debt is as much due to them, and the right to demand the thing as much vested in them, as in any other class of persons whatever, but for obvious reasons the law does not hold them responsible for the neglect. But when the act which gives the cause of action, happens after the death of the person to whom the cause of action is intended to be given, until a representative of the deceased is appointed the cause of action does not accrue or in fact exist. Nor does the statute in relation to executors and administrators interfere with this principle. The 8th and 9th sections of that title are only applicable to cases where the statute has commenced running before the death of the testator or intestate. (2 R. S. 449.) The year and a half in one case and the year in the other, after his death, are not to be taken into the account in the six years in which the action is required to be brought; thereby extending the statute in the latter case to seven years, and in the former to seven and a half years. But it does not touch the question as to what shall be deemed, in cases of this kind, the accruing of the cause of action. We are of opinion, therefore, that the statute of limitations was no bar to the action.

What equitable rights there may be between these parties it is not necessary now to consider. Upon this motion we are only to pass upon their legal rights. The report of the referee must stand confirmed, and the motion to set aside the same is denied.

MONTGOMERY SPECIAL TERM, June, 1848. *Paige, Justice.*

PETER ELWOOD and GEORGE ELWOOD *vs.* ABRAHAM H. DEIFENDORF, CORNELIUS DEIFENDORF, and DAVID DEIFENDORF.

As a general rule, sureties are entitled to the benefit of all securities which may have been taken by any one of them to indemnify himself against their joint liabilities for their principal. The security taken by one of the sureties enures to the benefit of all.

A party who objects to evidence, or to the competency of witnesses, should state specifically the grounds of his objection. It is not sufficient to object, generally, that the evidence is illegal, or the witness is incompetent; but the party objecting must put his finger on the very point, to apprise the court and his adversary of the precise objection he intends to make.

The admissions of an executor or administrator cannot be received in evidence, either as against his co-executors or co-administrators, or as against heirs and devisees.

A decree of the surrogate, made on the final settlement of the accounts of executors, is no bar to a suit by creditors who were not parties to the proceeding before the surrogate, and upon whom no citation was served.

The taking of a note, either of a debtor or of a third person, for a precedent debt, is no payment, unless it be expressly agreed to take the note as payment and to run the risk of its being paid; or unless the creditor parts with the note, or is guilty of laches in not presenting it for payment.

And it seems that a promissory note of the debtor, or of one of two or more joint debtors, given for a precedent debt, is not a satisfaction of such precedent debt, even although the creditor expressly accepts the note in satisfaction.

A negotiable note may operate *sub modo*, to satisfy a debt; as for the purpose of enabling a surety to bring an action for money paid, against the principal.

The taking a new security from the principal debtor, for an old debt past due, payable at a future day, without an agreement to extend the time of payment, does not discharge the surety.

To discharge a surety, by giving time to the principal debtor, not only the fact of suretiship must exist, but it must be known to the creditor at the time of doing the act complained of.

A surety has no cause of action against the principal debtor until he has actually paid the debt.

His remedy, on payment of the debt, is not on the original security, but is an action for money paid for his principal. The original debt is extinguished by the payment.

But if the surety gives his negotiable note for the debt, and it is received expressly in satisfaction of the debt, this is regarded as equivalent to the payment of money, and an action may be immediately brought by the surety, although the note remains unpaid.

5 398
194a 408
5 398
80h 210
5 398
81h 418
5b 398
5ap150
5b 398
40ap233

Elwood v. Deifendorf.

A party bound by either an express or an implied contract, in virtue whereof he may become liable to pay money to another, although his liability may be contingent, is a debtor.

After the execution of a note by two persons in the characters of principal and surety, the principal is a debtor to the surety; and although his liability to indemnify the surety is, previous to the payment of the debt by the latter, contingent, it is nevertheless a legal debt, and will be embraced in the terms of a will made by him, charging his real estate with the payment of his "just debts."

An action at law will not lie, in behalf of a creditor, against a devisee of land charged with the payment of debts, unless such devisee has made an express promise to pay the debt, or has paid a part of it, which will be considered as conclusive evidence of an express promise to pay.

Even where a devisee enters upon the land devised to him charged with the payment of debts, and promises to pay them, a court of law has no jurisdiction of an action against him for the recovery of the debts, unless the land is exclusively charged with their payment. If the personal estate is to be first applied in payment of the debts, or is to come in aid of the real, the cause belongs exclusively to a court of equity; and a court of common law has no jurisdiction. And in cases where a court of equity has exclusive jurisdiction, the only limitation applicable to the demand is the ten years' limitation of suits in equity.

A devisee of land charged with the payment of debts, by accepting the devise, becomes personally liable to pay the debts charged upon the land.

The personal liability of the devisee, however, will not exonerate the real estate from the charge. Such charge will continue a lien on the premises not only in the hands of the devisee, but also in the hands of his grantees.

But the devisee, by accepting such a devise, is primarily liable for the payment of the debts, in exoneration of the premises in the hands of his grantees. And the remedy of creditors must first be exhausted against the devisee personally, before their lien can be enforced against portions of the lands subject to the charge, which have been aliened by the devisee.

Real estate devised subject to the payment of debts, must be charged in the inverse order of its alienation.

Sureties of a surety, and assignees of a surety, are entitled to all the rights of the latter, and to be substituted in his place, as to all his remedies against the principal debtor, or his estate.

One of the rights of a surety is to charge his principal with the costs of a suit for the collection of the debt, which he has been compelled to pay.

IN EQUITY. The plaintiffs filed their bill in this suit on the 6th of Sept. 1845, to obtain payment from the estate and devisees of Henry Deifendorf, the father of the defendants, for money paid by Henry Elwood as surety for Henry Deifendorf. The plaintiffs in their bill alleged, that, in the year 1830, Henry Deifendorf borrowed of Peter I. Miller \$1000, and gave to Miller his promissory note for the amount, which was signed by

Elwood v. Deifendorf.

David Deifendorf, and also by Henry Elwood as surety; that the money was borrowed for the sole benefit of Henry Deifendorf; that Henry Deifendorf made his will, and therein made several devises and bequests in favor of his wife and children, and devised to the defendant Cornelius Deifendorf his homestead farm containing 160 acres, and a wood lot of 13 acres, in fee, subject to, and charged with, the payment of all his just debts and of the legacies mentioned in the will; and also bequeathed to his executors all the residue of his personal property not previously disposed of, in trust for the benefit of his son Cornelius, with power to sell the same and to apply the avails towards the payment of the testator's legal debts and the legacies given in his will. The plaintiffs, in their bill, further alleged that Henry Deifendorf died on the 8th of February, 1834; that letters testamentary on the will were granted to the defendants Abraham H. and David Deifendorf and to John H. Deifendorf, in May, 1834; that John H. Deifendorf afterwards died; that the testator left personal as well as real property; that Cornelius Deifendorf accepted the real estate devised to him, and sold the wood lot to one Henry Wiles for \$600; and that he, on the 5th day of October, 1843, conveyed by quit-claim deed the homestead farm to Charles Deifendorf in fee; and that Charles Deifendorf, by a like deed, on the 28th of December, 1843, conveyed the same in fee to the defendant Abraham H. Deifendorf. The plaintiffs, in their bill, further alleged that the note given to Miller was not paid previous to the death of Henry Deifendorf, and that a large sum remained due thereon at that time; that on the 15th of March, 1848, \$515.36 was due on such note; that on that day David Deifendorf requested Henry Elwood to sign, with him, a new note payable one day after date, to Miller, for such balance; that Henry Elwood complied with such request, upon condition that David Deifendorf would procure and deliver to him the \$1000 note. The bill further alleged that Miller, on the 9th day of February, 1839, commenced a suit on the new note given by David Deifendorf and Henry Elwood, and on the 22d of May, 1839, obtained a judgment thereon for \$621.78; that David Deifendorf, on the 1st

Elwood v. Deifendorf.

of March, 1839, became insolvent, and after the recovery of such judgment obtained a discharge under the bankrupt act; and that Henry Elwood, on the 26th of January, 1841, paid to Miller the whole amount of such judgment. The plaintiffs, in their bill, further alleged that Henry Elwood, for a valuable consideration, assigned his claim and demand for the payment of such judgment, against the estate of Henry Deifendorf, to the plaintiffs; and the plaintiffs prayed that an account might be taken of the real and personal estate of Henry Deifendorf, and that his executors might be decreed to pay to the plaintiffs the amount of the judgment, &c. paid by Henry Elwood; and in case there were no personal assets in their hands, that Cornelius and Abraham H. Deifendorf might be decreed to pay the same; and that in default thereof the homestead farm, devised to Cornelius, might be sold for the payment thereof. The defendants Abraham H. and David Deifendorf, in their answer, set up that the money on the \$1000 note given to Miller was borrowed by the defendant David Deifendorf for his own benefit, and that Henry Deifendorf and Henry Elwood signed the note as his sureties; that the new note for \$515,36, given to Miller for the balance due on the \$1000 note, was signed without any such consideration as was stated in the plaintiffs' bill; that such new note was made payable one day after date; and the defendants, in their answer, alleged that after the \$1000 note was taken up by David Deifendorf he cancelled the same. The defendants also set up in their answer, that the executors of Henry Deifendorf had a full and final accounting of their executorship, before the surrogate of Montgomery county, that Henry Elwood was duly notified of such accounting; and that the surrogate made a final decree upon such accounting. The defendants also set up in bar of the plaintiffs' recovery, that their cause of action did not originate within six years before the commencement of the suit. The bill was taken as confessed against Cornelius Deifendorf. Henry Elwood, Daniel H. Deifendorf, Daniel Moyer, David Elwood, Jacob Miller, Nathan Soule, George Crouse and David H. Little were examined as witnesses for the plaintiffs; and the defendant David Dei-

Elwood v. Deifendorf.

fendorf in behalf of his co-defendant Abraham H. Deifendorf. Henry Elwood and David Elwood were objected to by the defendants, as incompetent witnesses, on the ground of interest. To obviate the objection to Henry Elwood the plaintiffs executed and delivered to him two separate releases. After the execution of these releases the defendants persisted in their objection to the competency of Henry Elwood, but omitted to specify any ground for such objection. The plaintiffs objected to the competency of David Deifendorf, on the ground that he was a defendant in the suit. The judgment recovered on the new note given to Miller was, on the 26th of January, 1841, paid by a note to Miller for the damages, signed by Henry Elwood and by his brothers Peter Elwood and George Elwood the plaintiffs, and by David Elwood, as his sureties, dated Jan. 26, 1841, and by a note for the costs, signed by Henry Elwood and endorsed by his said three brothers. The note for the damages was paid up by Peter, George and David Elwood, in equal shares, on the 21st of June, 1845. The note for costs was previously paid. On the 11th of August, 1845, Henry Elwood, by an instrument in writing, for value received assigned to Peter and George Elwood (the plaintiffs) all his claim and demands against the estate of Henry Deifendorf, or his devisees, by reason of his signing a note with Henry and David Deifendorf to Peter Miller, reciting that such note was renewed, &c. for about \$515, and that the judgment recovered on the \$515 note had been paid mostly by Peter and George Elwood. The first release of Peter and George Elwood released Henry Elwood from all claims for all moneys advanced by them for him in payment of such judgment; and the second release released him from all claim or liability for damages which had accrued, or might accrue, to them in consequence of his aforesaid assignment to them. There was no evidence that Miller gave up to David Deifendorf the \$1000 note, when the new note for \$515, signed by David Deifendorf and Henry Elwood was delivered to him. Henry Elwood testified that he agreed to assign to the plaintiffs his interest in the Miller claim because they had paid the Miller debt. It appeared by the decree of the

Elwood v. Deifendorf.

surrogate upon the accounting of the executors of Henry Deifendorf, that citations were issued only to the widow, heirs and next of kin of Henry Deifendorf, and that on the accounting Henry Elwood appeared as the husband of his wife, who was an heir and legatee of Henry Deifendorf.

H. J. Campbell & N. Hill, Jun. for the plaintiffs.

T. B. Mitchell, for the defendants.

PAIGE, J. The evidence, I think, establishes the allegation in the plaintiffs' bill, that Henry Deifendorf was the principal debtor in the note for \$1000, given to Peter I. Miller in 1830, and that Henry Elwood and David Deifendorf signed the note as his sureties. Henry Elwood swears that he signed the note by the request of Henry Deifendorf, and as his surety; that the latter, when he applied to him for his signature, stated to him that he wanted the money, to be borrowed on the note, to enable him to redeem the farm of Abraham Deifendorf, (which had been sold on an execution;) and that frequently after the note was executed, Henry Deifendorf spoke of the note, and said to the witness that he should have no trouble about it. Nathan Soule proves an arrangement entered into between him and Henry Deifendorf, by which it was agreed that he (Soule) should bid in the real estate of Abraham Deifendorf, and that Henry Deifendorf should redeem the same, and should pay him a part of the redemption money soon after the sale. And Soule testifies that money and a note of Peter I. Miller, amounting to about \$1000, were, in pursuance of this arrangement, paid to him by Henry Deifendorf, or some one of his sons, either at the time of, or soon after the sale, and that the balance of his bid, and interest, was paid on the 15th of June, 1831, when the premises were redeemed. Soule further testified that Henry Deifendorf told him that he would let his son Daniel take the title to the property, as he wanted to help him; and that he expected to make a loan of \$1000 from Miller; and that witness' impression was that Henry Deifendorf sub-

Elwood v. Deifendorf.

sequently told him that Henry Elwood signed the note to Miller as his surety. The evidence of Daniel H. Deifendorf and George Crouse, corroborates the testimony of Henry Elwood and Nathan Soule. The arrangement testified to by Soule was carried out, and Soule bid off the real estate of Abraham Deifendorf for \$1600, and Daniel H. Deifendorf redeemed the property, and took the sheriff's deed in his own name, and paid to his father Henry Deifendorf on account thereof, \$1600, and conveyed to him 70 acres of the premises so redeemed; and retained as his own a lot of 60 acres, valued at \$3000. This evidence satisfactorily establishes, that the money borrowed from Miller was borrowed by Henry Deifendorf, on his own account; and that in giving the note for the same he was the principal, and the other two signers his sureties. If David Deifendorf received any part of the borrowed money, or if any part of it was applied in payment of his debts, it must have been in consequence of some subsequent arrangement made by him with his father, after the note was executed. It is very possible that some agreement was subsequently entered into between David Deifendorf and his father, by which David assumed the payment of the note to Miller. For it appears by the testimony of David Deifendorf that all the payments which had been made on the original note of \$1000, previous to the giving of the new note for \$515, were made by him. But if such agreement was entered into between David and his father, it did not alter the relation of principal and surety between the latter and Henry Elwood, previously created by the execution of the original note. There is no evidence that Henry Elwood was made acquainted with such agreement, if any existed, or that he was notified that David Deifendorf sustained any other relation to him than that of a co-surety. Henry Elwood was objected to by the defendants as an incompetent witness for the plaintiffs, on the ground of interest. The defendants, on the objection being made, executed and delivered to him two separate releases, to obviate the objections made to his competency. After the delivery of these releases, the defendants persisted in their objection to the competency of the witness, but omitted to

Elwood v. Deifendorf.

specify any ground for such objection. On the argument it was insisted that the assignment, by Henry Elwood, of his claim against the estate of Henry Deifendorf, was not an absolute sale of such claim; that whatever the plaintiffs realized out of the claim must be credited to Henry Elwood on the Miller debt, paid by the plaintiffs and by David Elwood; and that such credit would go to extinguish the claim of David Elwood against the witness, for the money advanced by him in part payment of the Miller debt. The assignment to the plaintiffs by Henry Elwood is in terms absolute, and I think it is an absolute transfer to them of his demand against the estate of Henry Deifendorf. The plaintiffs will therefore be under no obligation to account to Henry Elwood for such demand, if collected by them. The only question connected with Henry Elwood's interest in the event of this suit, arising out of the assignment, is whether such assignment is to be considered as a security taken by the plaintiffs to indemnify them against their liability as sureties for Henry Elwood, and if so, whether David Elwood, as their co-surety, is not entitled to share in the benefit of it. If he is entitled to the benefit of the assignment, then, as a part of the recovery in this suit must be applied to reimburse him for the money advanced by him in part payment of the Miller debt, which Henry Elwood, as his principal, is liable to refund to him, the latter is interested in the event of the suit. It cannot be disputed that, as a general rule, sureties are entitled to the benefit of all securities which may have been taken by any one of them, to indemnify himself against their joint liabilities for their principal. (1 *Story's Eq. Jur.* § 499. *Theob. on Pr. & Surety*, ch. 11, § 283. *Swain v. Wall*, 1 *Ch. Rep.* 149. *Fagan v. Jacocks*, 4 *Dev.* 263. *Bachelder v. Fisk, &c. ex'rs*, 17 *Mass. Rep.* 464. 5 *New Hamp. Rep.* 358.) The security taken by one of the sureties enures to the benefit of all. But it will not be necessary to decide, in this case, whether the assignment of the demand against the estate of Henry Deifendorf or his devisees, to the plaintiffs, enured to the benefit of David Elwood; inasmuch as I have come to the conclusion that the defendants have waived the

Elwood v. Deifendorf.

objection to the competency of Henry Elwood as a witness, on the ground of his interest growing out of the right of David Elwood, to share in the benefit of the assignment to the plaintiffs, by not specifying that as the ground of their objection. If this ground of objection had been specified before the examiner, the plaintiffs would have had an opportunity of obviating it, by obtaining a release from David Elwood. A party who objects to evidence, or to the competency of witnesses, should state specifically the grounds of his objection. It is not sufficient to object generally that the evidence is illegal, or the witness is incompetent: but the party objecting must put his finger on the very point, to apprize the court and his adversary of the precise objection he intends to make. (*Camden v. Doremus*, 3 *How. U. S. Rep.* 515. 1 *Cowen*, 622. 12 *Wend.* 504. 1 *Id.* 418. 1 *Hill*, 91.) If the assignment to the plaintiffs enured to the benefit of David Elwood, he was undoubtedly an incompetent witness for the plaintiffs. If Henry Elwood had not assigned to the plaintiffs, they and David Elwood having, as his sureties, paid the original debt of Henry Deifendorf, would, in equity, have been subrogated to all his rights and remedies, as the surety of Henry Deifendorf, for the recovery against him, or his estate, of the debt so paid by them. (1 *John. Ch.* 409.) And I do not believe that the plaintiffs, by taking an assignment to themselves alone, of the claim of Henry Elwood as surety, against the estate of Henry Deifendorf, could exclude David Elwood from the benefit of a participation therein, to which he was in equity entitled, as soon as he paid a part of the original debt. But I do not regard the testimony of David Elwood as at all important; and I shall not therefore rely upon it, in my disposition of the case. The execution of the notes given by Henry Elwood, and by the plaintiffs and David Elwood, to which the latter testified, was admitted by the defendants; and the residue of the testimony of this witness, related principally to the declarations of John H. Deifendorf, the deceased executor of Henry Deifendorf, admitting the liability of the estate of the latter to Henry Elwood, for the Miller debt. These declarations were not admissible as evi-

Elwood v. Deifendorf.

dence against the defendants. It is now well settled that the admissions of an executor or administrator cannot be received in evidence either as against his co-executors or co-administrators, or as against heirs and devisees. (3 *Cowen*, 612. 6 *John. Ch.* 372. 5 *Wend.* 561. 4 *Cowen*, 494. 14 *Wend.* 97. 5 *Hill*, 239. 14 *Wend.* 90.) All evidence, therefore, of the admissions of John H. Deifendorf of the liability of the estate of his father to Henry Elwood, was illegal, and must be stricken out of the case. David Deifendorf having been discharged as a bankrupt, under the bankrupt act, could have no interest in the event of the suit. He was therefore a competent witness for the defendants.

The decree of the surrogate on the final settlement of the account of the executors of Henry Deifendorf, is no bar to a recovery by the plaintiffs. The creditors of Henry Deifendorf were not parties to that proceeding. The citation was served only on the widow, legatees, heirs and next of kin. Henry Elwood was cited merely as the husband of a legatee. The claims of the creditors did not come in question, and the surrogate had no authority to pass upon them. His authority to determine the validity of claims of creditors is limited to cases where it appears that a part of the estate remains to be paid or distributed. (2 *R. S.* 95, § 71.) There is no evidence in this case that either Henry Elwood presented his claim as a creditor, to the surrogate, or that the latter passed upon it. It appears from the surrogate's decree that no part of the estate of Henry Deifendorf remained in the hands of the executors, to be paid or distributed; and it appears that the personal estate was greatly insufficient for the payment of the debts. The decree, under the circumstances, was only conclusive evidence of the facts specified in section 65, of the title of the revised statutes relative to executors and administrators. (2 *R. S.* 94.) The decree is only important as an item of evidence to show that the personal estate of Henry Deifendorf has been exhausted in the payment of his debts, and that no part of it remains to be applied in payment of the claim of the plaintiffs. The plaintiffs, therefore, if they have established their claim as one

Elwood v. Deifendorf.

of the debts of Henry Deifendorf, must seek their remedy against Cornelius Deifendorf, the devisee, personally, and the real estate devised to him, which the testator expressly charged with the payment of his debts.

The giving of the note to Miller, on the 15th of March, 1838, for \$515,36, (the balance due on the \$1000 note,) by Henry Elwood and David Deifendorf, did not discharge the estate of Henry Deifendorf from liability. There is no evidence that this note was received by Miller expressly as payment of the original note; or that the latter was given up by Miller to David Deifendorf, on the receipt of the new note for the balance due thereon. The taking a note, either of a debtor or of a third person, for a precedent debt, is no payment, unless it be expressly agreed to take the note as payment and to run the risk of its being paid; or unless the creditor parts with the note, or is guilty of laches in not presenting it for payment. (*Tobey v. Barber*, 5 John. 72. *Muldon v. Whitlock*, 1 Cowen, 303, 304, 306, 307.) And it seems that a promissory note of the debtor, or of one of two or more joint debtors, given for a precedent debt, is not a satisfaction of such precedent debt, even although the creditor expressly accepts the note in satisfaction. This principle, distinctly advanced in *Cole v. Sackett*, (1 Hill, 516,) and in *Waydell v. Luer*, (5 Id. 448,) cannot be considered as overruled in the decision of the latter case by the court of errors. (3 Denio, 410.) A negotiable note may operate *sub modo*, to satisfy a debt; as for the purpose of enabling a surety to bring an action for money paid, against the principal. (5 Hill, 451, *per Cowen, J.*) If the new note for \$515,36 should be deemed a payment of the old note, I cannot see how it could injuriously affect the remedy of Henry Elwood as a surety, or of his assignees, against the estate and devisees of Henry Deifendorf. That note was eventually paid by Henry Elwood. It was given by him and David Deifendorf as the sureties of Henry Deifendorf, and because they were liable to Miller in that character. That note having been wholly paid by Henry Elwood, as surety, he can, *qua* surety, call upon his principal for reimbursement. The counsel of the defendants

Elwood v. Deifendorf.

made a point, upon the argument, that the giving the new note to Miller extended the time of payment of the original note, and thereby discharged the estate of Henry Deifendorf from liability: assuming that Henry Deifendorf was only liable as surety. There being no agreement to extend the time of payment, the giving the new note could not have that effect. The new note can only be regarded as a new or a collateral security for the payment of the old note. And although it was made payable at a future time, (one day after date,) it implied no agreement to postpone the remedy on the old note. It is now the settled doctrine that the taking a new security from the principal debtor for an old debt past due, payable at a future day, without an agreement to extend the time of payment, does not discharge the surety. (*Gahn v. Niemcewicz*, 11 *Wend.* 320. *Troopenny v. Young*, 3 *Bar. & Cres.* 208. *Emes v. Widdowson*, 4 *Car. & Payne*, 151. *Pring v. Clarkson*, 1 *Bar. & Cres.* 14. *United States v. Hodge*, 6 *How. S. C. Rep.* 279.) But if I am right in my conclusion, from the evidence, that Henry Deifendorf was the principal debtor, the doctrine, in relation to the discharge of a surety by the creditor's giving time, without his consent, to the principal debtor, has no application to this case. And if by any subsequent arrangement between Henry and David Deifendorf, the latter assumed, for a valuable consideration, the payment of the debt, and thereby took upon himself the character of a principal debtor in relation to Henry Deifendorf, as Miller and Henry Elwood were both ignorant of this change in the relation of these parties to each other, an express agreement, made by them and David Deifendorf, to extend the time of payment, would not have discharged either Henry Deifendorf or his estate. For, to discharge a surety by giving time, not only the fact of suretiship must exist, but it must be known to the creditor, at the time of doing the act complained of. (11 *Wend.* 323. 3 *Paige*, 651.) When Henry Elwood signed the new note for \$515,36, neither Miller nor Henry Elwood had any reason to suppose that David Deifendorf stood in the relation of a principal debtor, or that Henry Deifendorf and his personal repre-

Elwood v. Deifendorf.

representatives and heirs, and devisees, had become divested of that character.

A surety has no cause of action against the principal debtor until he has actually paid the debt. His remedy, on payment of the debt, is not on the original security, but is for money paid for his principal. The original debt, by the payment, is extinguished. (*Story's Eq. Jur.* § 499, b.) But if the surety gives his negotiable note for the debt, and it is received expressly in satisfaction of the debt, this is regarded as equivalent to the payment of money, and an action may be immediately brought by the surety, although the note remains unpaid. (*Rodman v. Hedden*, 10 *Wend.* 501. *Wetherby v. Mann*, 11 *John.* 518.) The evidence authorizes the conclusion that the negotiable notes given by Henry Elwood and his three brothers, on the 26th of January, 1841, for the amount of the judgment recovered by Miller against Henry Elwood and David Deifendorf, on the \$515 note, were accepted by Miller in full satisfaction of the judgment. That was in law a payment by Henry Elwood of the balance due on the original note, and his cause of action then accrued against the personal representatives and devisees of Henry Deifendorf, and not before. A negotiable note given by a surety, for the debt, to be equivalent to a payment of money, must be received expressly in full satisfaction of the debt. The note for \$515.36 was not so received, and it cannot therefore be regarded as a payment and extinguishment of the original note.

Henry Deifendorf sustained the character of debtor to Henry Elwood, after the execution of the \$1000 note to Miller. Although his liability was, at the time of the publication of his will, contingent, it was nevertheless a legal debt, and as such was, together with his other debts, made by his will a charge and lien on the lands devised by him to Cornelius Deifendorf. A party bound by either an express or an implied contract, in virtue whereof he may become liable to pay money to another, although his liability may be contingent, is a debtor. (18 *Wend.* 375, 386. 5 *Coven.* 67. 8 *Id.* 429.) In *How v. Ward*, (4 *Green.* 195,) it was held that the relation of debtor and cred-

Elwood v. Deifendorf.

itor existed between co-sureties; although there was only an implied contract between the parties, and although the liability of the defendant depended on a double contingency. The demand in this case arose fundamentally before the making of the testator's will. It arose upon a contract implied from the execution of the \$1000 note, by which the testator agreed to refund to Henry Elwood all the moneys which he as his surety, should be compelled to pay to Miller, in consequence of his having signed the note.

The demand of the plaintiffs is not barred by the statute of limitations. The ten years' limitation of suits in equity is the only time of limitation applicable to this demand. (2 R. S. 302, § 52.) The plaintiffs have no remedy at law. No action at law will lie against Cornelius Deifendorf. He has not made an express promise to pay, nor has he made payments, of a part of the plaintiffs' demand, which might be considered as conclusive evidence of an express promise to pay. (*Beecker v. Beecker*, 7 John. 99. *Van Orden v. Van Orden*, 10 Id. 30. *Kelsey v. Deyo*, 3 Cowen, 144.) Even where a devisee enters upon the land devised to him, charged with the payment of debts, and promises to pay them, a court of law has no jurisdiction of an action against him for the recovery of the debts, unless the land is exclusively charged with their payment. If the personal estate is to be first applied in payment of the debts, or is to come in aid of the real, as is the case in this suit, the cause belongs exclusively to a court of chancery, and a court of common law has no jurisdiction. (*Tole v. Hardy*, 6 Cowen, 340. *Kelsey v. Deyo*, 3 Id. 144.) As, previous to the adoption of the new constitution, the courts of common law and of equity had not concurrent jurisdiction of the plaintiffs' cause of action, and as the court of chancery had exclusive jurisdiction thereof, the only limitation applicable to the plaintiffs' demand is the ten years' limitation of suits in equity. (*Dias v. Bouchard*, 10 Paige, 446.) The plaintiffs' cause of action accrued on the 26th of January, 1841, and the plaintiffs' bill was filed on the 5th of September, 1845, less than five years after the accruing of the cause of action. If the cause of action had accrued at the

Elwood v. Deifendorf.

time of the giving the new note for \$515,36, on the 15th of March, 1838, the claim would not have been barred; as less than ten years would have elapsed at the time of the commencement of the suit. The defendants have mistaken in their answer, the time of limitation applicable to the plaintiffs' demand. They have set up the six years' limitation as a bar. The answer is therefore defective in not setting up the limitation applicable to the case. (*Van Hook v. Whitlock*, 3 *Paige*, 417, 418.) Previous to the adoption of the revised statutes there was no statute of limitations applicable to a charge on real estate. (*Kane v. Bloodgood*, 7 *John. Ch.* 115.) Such charge was barred only by the lapse of 20 years, in analogy to the statute bar of an action of ejectment.

Cornelius Deifendorf, by his acceptance of the devise, became personally liable to pay the debts charged on the real estate devised to him. (*Dodge v. Manning*, 11 *Paige*, 347; *S. C.* 1 *Comst.* 298.) His personal liability, however, did not exonerate the real estate from the charge. Such charge continued a lien on the premises in the hands of not only the devisee but also of his grantees. But although the debts of the testator are a lien on the lands devised to his son Cornelius, Cornelius by his acceptance of the devise is primarily liable for their payment, in exoneration of the premises in the hands of his grantees. (11 *Paige*, 347. 1 *Comst.* 301, 303.) And the remedy of the plaintiff must first be exhausted against him personally before their lien can be enforced against the homestead purchased by the defendant Abraham H. Deifendorf. The real estate devised must be charged in the inverse order of its alienation. The plaintiffs cannot enforce their lien in this suit against the wood lot sold by Cornelius to Henry Wiles, as Wiles is not a party to the suit. I infer from the allegations in the bill and answer that the wood lot was sold previous to the sale of the homestead to Charles Deifendorf. If that be so, the remedy against the homestead must be exhausted before resort is had to the wood lot. The defendants made no objection, in their answer, that Wiles was not made a party, and did not set up that the wood lot ought to be applied in

Elwood v. Deifendorf.

payment before the homestead was resorted to, or that it was liable to be charged ratably with the homestead.

The plaintiffs being sureties of a surety, and also assignees of a surety, are entitled to all the rights of the latter, and to be substituted in his place as to all his remedies against the principal debtor or his estate. (1 *John. Ch.* 412. 3 *Paige*, 314. 6 *Id.* 32, 521. 2 *John. Ch.* 554. 4 *Id.* 123. 5 *Wend.* 89. 10 *John.* 525. *Story's Eq. Jur.* § 499.) One of the rights of a surety is to charge his principal with the costs of a suit for the collection of the debt which he has been compelled to pay. (3 *Barb. Sup. Court Rep.* 642.) This principle entitles the plaintiff to recover the costs of the suit against Henry Elwood and Daniel Deifendorf on the note for \$515,36.

The personal estate of Henry Deifendorf having been exhausted in the payment of debts, a decree must be entered for the payment by the defendant Cornelius Deifendorf, of the amount of the note given in payment of the judgment recovered on the note of \$515,36, with interest thereon from the 26th of January, 1841, together with the costs of this suit. And the decree must declare that the same (debt and costs) are a lien and charge on the lands described in the pleadings as the homestead farm. And the decree must direct that in case the plaintiffs are unable to collect the same from Cornelius Deifendorf, or his estate, they be permitted to sell the homestead farm for the payment of whatever amount of such debt and costs shall remain unpaid, after exhausting their said remedy against Cornelius Deifendorf.

LIVINGSTON GENERAL TERM, August, 1848. *Maynard, Marvin, Welles, and Selden*, Justices.

BATTLE vs. THE ROCHESTER CITY BANK.

The cases in which a vendee is allowed to recover back money paid on a contract for the purchase of real estate, where the contract has been rescinded, are, 1st, where the rescission is voluntary, and by the mutual consent of both parties, and without the default or wrong of either; 2d, where the vendor is incapable or unwilling to perform the contract on his part; or 3d, where the vendor has been guilty of fraud in making the contract. *Per WELLES, J.*

In either of these cases, it would be against equity and conscience for the vendor to retain the money; and the law implies a promise, on his part, to refund it. *Per WELLES, J.*

But where the vendor has, in all respects, performed his contract, and the rescission is entirely in consequence of the unexcused default of the vendee, in making further payments, the latter cannot recover back the money paid by him.

ASSUMPSIT for money had and received. The cause was tried before DAYTON, C. J., at the Monroe circuit, Sept. 28, 1844. The suit was commenced on the 19th day of June, 1843. At the trial, the plaintiff's counsel, in his opening, stated his case, and offered to prove the same as follows, viz: That on the 19th day of October, 1841, at Rochester, by a certain agreement in writing, it was agreed between the plaintiff and defendants, that provided the said defendants should bid off a certain warehouse then owned by the plaintiff, which was to be sold on the 22d day of October then instant, under foreclosure of a mortgage assigned to said defendants by Harvey Ely, for the amount of said mortgage and interest, the defendants would allow the plaintiff nine thousand dollars for said warehouse and a dwelling house and lot on Allen-street, Rochester, (which house and lot were bid off by said bank at a sale by a master in chancery, on the 1st of July, 1841,) on account of said Battle's debt to said bank, including the amount of the aforesaid mortgage and interest; and in case the said sum of \$9000 exceeded the debt due to said bank and the amount of the afore-

Battle v. The Rochester City Bank.

said mortgage and interest, then the plaintiff, by the agreement, was to purchase of said bank, and the bank to give said Battle a contract for, a certain farm owned by the bank, in the town of Greece, Monroe county, called the Chapin farm, containing 154 acres, for which said Battle was to pay said bank \$30 per acre, and the excess, if any there should be as aforesaid, to be endorsed on said contract. That before, and on, and after the first of July, 1841, a verbal agreement existed between the plaintiff and defendants, in substance, that if the defendants should bid off the house and lot and warehouse, they should allow the \$9000, &c. as aforesaid, and the balance, if any, should be paid in so much of the Chapin farm as would be necessary for that purpose; but it having been ascertained, in the opinion of the officers of the bank, that the farm could not conveniently be divided, the verbal agreement was merged in the written one above set forth. That on the 28th day of April, 1840, the plaintiff executed to the defendants a mortgage, by which the plaintiff conveyed to the defendants the house and lot above mentioned, in security for the payment of any debt he might be liable to pay to the defendants, either as the drawer or endorser of any promissory note or bill of exchange thereafter made, or any paper which might thereafter be discounted by said bank for the benefit of the plaintiff, according to the condition of a bond executed at the same time by said plaintiff, and if he should then pay, the bond and mortgage to be void. That the plaintiff was not indebted to the bank before the execution of said mortgage. That afterwards he became indebted to said bank by means of paper discounted for his benefit, and on the 22d day of December, 1840, his indebtedness consisted of four promissory notes of the last mentioned date, executed by the plaintiff, payable to the defendants as follows: one of \$400 payable February 26, 1841; one of \$2000 payable March 25, 1841; one of \$2000 payable April 25, 1841; and one of \$1000 payable May 25, 1841. That said notes not being paid, the defendants filed their bill in the court of chancery to foreclose said mortgage, and by decree of said court the mortgaged premises were sold by a master of said court, and bid off by,

Battle v. The Rochester City Bank.

and conveyed to, the said defendants, on the first day of July, 1841, which is the sale by the master and bidding off by the defendants first above mentioned. That said house and lot, though real estate, was not such as was requisite for said bank, for its accommodation in the convenient transaction of its business; neither was it real estate which had been mortgaged to it in good faith by way of security for a loan or loans previously contracted, or for moneys due; neither was it such as had been purchased at a sale or sales upon a judgment or judgments, decree or decrees, mortgage or mortgages, obtained or made for such debts; and that the same was, and, after the expected sale and purchase on the 22d day of October, 1841, would be equally true in relation to the warehouse. That said bank held a mortgage on the warehouse, executed by the plaintiff to said bank on the 3d day of December, 1840, to secure the same debt for which the four notes and the mortgage on the house and lot above mentioned were given, which mortgage was given to secure a debt actually due said bank before its execution, but which has never been foreclosed, and which was a lien on the warehouse subsequent to the mortgage to Ely, above mentioned, and also subsequent to the lien of a judgment obtained after the Ely mortgage, by the Canal Bank of Lockport against said Battle. That said defendants, to protect themselves from the prior liens aforesaid, had purchased of said Ely the said mortgage, and taken an assignment thereof, as mentioned in said agreement, had filed their bill in chancery in their own name, obtained a decree of foreclosure and sale, and caused the same to be advertised for sale, as mentioned in said agreement. That on the 22d day of October, 1841, the defendants bid off and took a conveyance of the said warehouse for a sum less than the Ely mortgage. That by means of all the premises herein before and after stated, (without the aid and consummation of the contract of the 19th of October, 1841,) none of said real estate was such as had been conveyed to said bank in satisfaction of debts previously contracted in the course of its dealings. That on the 22d day of October, 1841, or on some other day between that day and the 9th day of November,

Battle v. The Rochester City Bank.

1841, both inclusive, as of the 22d of October aforesaid, the said plaintiff and the said defendants accounted together of and concerning the moneys mentioned in said promissory notes, the interest which had accrued thereon, certain payments which had been made to apply thereon, and interest on said payments, and of and concerning the costs of the foreclosure of and sales by means of the two mortgages aforesaid, and of and concerning the \$9000 agreed to be allowed for the two parcels of real estate, to wit, the house and lot and warehouse aforesaid; which accounting was in pursuance of the agreement of the 19th of October first above mentioned, and was for the purpose of ascertaining the balance, if any, due the plaintiff, to be mentioned in and endorsed upon the agreement hereinafter set forth; and upon that accounting, the defendants were found in arrear and indebted to the plaintiff in the sum of \$1823,44, to be paid, as the agreement and understanding between the parties then was, by applying it as part payment for the Chapin farm, by mentioning it in and endorsing it as payment on the article then about to be executed, as hereinafter set forth. That on the 9th day of November, 1841, an agreement in writing was duly made and executed between the plaintiff and the defendants in words and figures following: "Articles of agreement made this ninth day of November, in the year of our Lord one thousand eight hundred and forty-one, between William Philpot, cashier of the Rochester City Bank, by authority of a resolution of the directors of said bank, of the first part, and William S. Battle, of the city of Rochester, state of New-York, of the second part, as follows, to wit: The said party of the first part hereby covenants and agrees with the said party of the second part, that he will sell and convey in fee, by a good and sufficient warranty deed, to the said party of the second part or his assigns, all that certain piece or parcel of land situate, lying and being in the town of Greece, in the county of Monroe and state of New-York, being the east half of lot (No. 1) number one in the first division of lots in the southwest part of township (No. 2) number two of the short range of townships in said town of Greece, bounded north, east and south by the

Battle v. The Rochester City Bank.

lines of said lot number one, and west by the west half of said lot, as conveyed to Asa Bennet by deed dated 16th April, 1836, containing (150) one hundred and fifty acres of land more or less. Also, five acres to be laid out in a square form on the north side of the ridge road, in the northeast corner of lot one hundred and forty, township one, short range, Greece—reference being had to William Sheppard's allotment—being the same premises conveyed to the Rochester City Bank by John C. Nash, master in chancery, by deed bearing date 31st July, 1841, upon the payment by the said party of the second part or his assigns, to the said party of the first part, of the sum of four thousand six hundred and fifty dollars and interest in manner following, to wit—in hand the sum of one thousand eight hundred and twenty-three dollars forty-four cents, and the balance (\$2826,56) in five equal annual instalments from the first day of May next, with interest to be computed at seven per cent per annum from the 22d day of October last, and paid annually, and all taxes to be assessed on the said premises. And the said party of the second part covenants and agrees with the said party of the first part, to pay to him the said sum of money in manner aforesaid with the interest aforesaid, which payment is hereby declared to be a condition precedent to the execution of a deed by the said party of the first part. And in case of failure on the part of the said party of the second part to make either of the preceding payments when due, or in any respect to fulfil this contract, the same shall become void on such failure, if the party of the first part shall elect to rescind it, and on his previously giving notice of at least thirty days of such election, to be served personally on the party of the second part, provided he shall be in the county of Monroe, but otherwise to be served by notice in a public newspaper in said county for thirty successive days, and besides the party of the second part shall in case of such failure and consequent rescinding of this contract forfeit one hundred dollars as the ascertained and liquidated damages, and shall retain no legal or equitable interest in the premises after this contract is rescinded. The party of the second part may take immediate possession of the said

Battle v. The Rochester City Bank.

premises. In witness whereof," &c. That the sum of \$1823,44 mentioned in the last mentioned contract, to be paid in hand, is the same sum found due from the defendants to the plaintiff on the accounting as above set forth, and that the same sum was at the time of executing said agreement endorsed on the back thereof as a payment of such sum on the contract by the defendants by their cashier, and by their authority, in the words and figures following: "\$1823,44. Nov. 9th, 1841, received on the within contract eighteen hundred and twenty-three ~~44~~ dollars according to its terms and conditions. W. S. Philpot, cash'r." And thus the first mentioned agreement was (modified as appears above) performed, and the respective parties, the plaintiff and defendants, thus had the benefit of it. That the plaintiff, in pursuance of the right which he acquired by the contract of November 9th, above set forth, entered into possession of the said premises and continued to occupy the same until the last mentioned contract was rescinded as hereinafter mentioned. That the plaintiff having neglected to pay the defendants the first of the five annual instalments therein mentioned, and a large amount of interest due on said contract, the said defendants, in pursuance of the power reserved and conferred on them by the last mentioned contract so to do, elected to rescind the same, and on the 12th day of May, 1843, in pursuance of that power, caused a notice directed to said plaintiff to be personally served on him as follows:

"Sir: Take notice, that by the terms of an article of agreement, bearing date November, 9th, 1841, (meaning the contract last above set forth) made and executed by and between the Rochester City Bank of the one part and yourself of the other part, a payment of five hundred and sixty-five dollars and thirty-one cents and a large amount of interest, became due and payable from you on said articles of agreement, on the first day of May instant, and that the same remains unpaid, and that the said bank elects to declare said articles of agreement void and the same be and is rescinded, unless the said payment with the interest aforesaid be paid within thirty days from the service of this notice, and that said bank will then and there-re-

Battle v. The Rochester City Bank.

quire possession of the premises described in said agreement. Dated May 12th, 1843. Yours, &c. W. S. Philpot, Cash'r." That the plaintiff did not pay the money mentioned in said notice, or any part thereof, but within thirty days from the service of said notice, surrendered the possession thereof to the defendants, and the said defendants have ever since retained the possession thereof by the reception of the rents and profits thereof. That the defendants, by articles of agreement between them and John Weston and George H. Weston, made December 16th, 1841, agreed to sell and convey to said Westons, or either of them, the said house and lot in Allen-street, for the sum of three thousand eight hundred dollars, and in pursuance of that agreement, did afterwards, on the second day of August, 1842, by deed of bargain and sale of that date, sell and convey to the said George H. Weston the said house and lot, and did then and there receive of him a large sum of money, part of the purchase money, and took his bond and mortgage on the property for the balance; and the defendants did in and by said deed warrant to the said Weston, his heirs and assigns, the quiet and peaceable possession of the said premises against any person lawfully claiming the same or any part thereof. That Weston, in pursuance of said agreement, went into possession of said premises, and has ever since continued in possession thereof. That the amount for which the defendants bid off the house and lot at the master's sale was two thousand seven hundred dollars. That the defendants immediately on the sale and purchase by them of the warehouse property as above mentioned, entered into possession thereof and have ever since continued in possession, or the reception of the rents and profits thereof.

The counsel for the defendants thereupon, on said opening by the plaintiff's counsel, moved for a nonsuit, and his honor the circuit judge, being of the opinion that the plaintiff could not recover upon the facts stated in the opening, directed a nonsuit, which was entered. The plaintiff upon a bill of exceptions now moved to set aside the nonsuit, and for a new trial.

Battle v. The Rochester City Bank.

S. Boughton, for the plaintiff.

H. Humphrey & E. D. Smith, for the defendants.

By the Court, WELLES, J. The plaintiff cannot and does not ask to have the case put in a more favorable aspect for him, than it will bear by looking at the transactions as commencing with the contract or articles of agreement for the sale to him by the defendants, of the farm in Greece, bearing date the 9th day of November, 1841, and by regarding the payment of \$1823,44, endorsed upon the contract, as having been actually made in money at the time it was endorsed. He claims to recover the amount thus paid, on the ground that the contract is rescinded, and it being rescinded, that there is so much money left in the defendants' hands which belongs to the plaintiff; there being nothing by virtue of which the defendants can retain it. And he insists that his right to recover this money in no sense depends upon whether the contract was rescinded by his own or the defendants' fault. That if it be once established that the contract is rescinded, the right to recover back the money paid on it follows as a matter of course, no matter for what cause, or in consequence of whose fault it was rescinded. And I think it incumbent upon the plaintiff to maintain a proposition as broad as this in order to sustain this action.

The cases in which a vendee is allowed to recover back money paid on a contract for the purchase of real estate, where the contract has been rescinded, are, 1st. Where the rescission is voluntary, and by the mutual consent of both parties, and without the default or wrong of either; 2d. Where the vendor is incapable or unwilling to perform the contract on his part; or 3d, where the vendor has been guilty of fraud in making the contract. In either of those cases it would be against equity and conscience for the vendor to retain the money, and the law implies a promise on his part to refund it. But in a case where the vendor has in all respects performed his contract, and the rescission is entirely in consequence of the unexcused default of the vendee in making further payments, to allow him to recover

Battle v. The Rochester City Bank.

back the money paid, would in my opinion be little short of offering a bounty for the violation of contracts.

In the case at bar, it is not pretended that the defendants have not fulfilled, to the letter, every part of the agreement on their part to be fulfilled, and the plaintiff, by his counsel, in his opening, admits that he neglected to pay the first of the five annual instalments mentioned in the contract. I confess myself entirely unable to find in any elementary treatise, or reported case, a principle recognized, which would allow the plaintiff to recover. In the case of *Ketchum v. Evertson*, (13 John. 365,) Spencer, J. in delivering the opinion of the court, says: "It would be an alarming doctrine to hold, that the plaintiffs might violate the contract, and because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has advanced money upon it, would have the same right to recover it back that the plaintiffs have." Again; "To say that the subsequent sale of the land gives a right to the plaintiffs to recover back the money paid on the contract, would, in effect, be saying that the defendant could never sell it without subjecting himself to an action by the plaintiff."

In the case of *Green v. Green*, (9 Cowen, 46,) which was an action to recover money paid by the plaintiff to the defendant, on an agreement for the purchase of land, on the ground that the contract was rescinded, Chief Justice Savage, who delivered the opinion of the court, held that the plaintiff was not entitled to recover, for the reason that he, and not the defendant, was in default. I refer to that case as containing a clear and practical illustration of the doctrine on the subject. The chief justice, after citing and commenting upon a number of decisions bearing on the question, remarks: "I forbear the citation of more cases. I have found none of a recovery, where the party wishing to consider the contract rescinded, has not shown a breach of the contract on the other side, or what is equal to it."

It has been, among other things, urged in behalf of the plaintiff, that the agreement in this case was rescinded in pursuance of the mutual consent of the parties, contained in the

Battle v. The Rochester City Bank.

agreement itself, and that the plaintiff was therein left at liberty to put an end to it, and that as he has done no more than the defendants virtually agreed he might do, he is not to be deemed in default, and that therefore according to one of the rules above laid down, he should be allowed to recover. But is this so? He covenanted to make the payments, and has failed, and the provision about rescinding was a right secured to the defendants, and not to the plaintiff. It did not prevent the defendants' enforcing the contract. They had an election to do so, or to treat it as rescinded on account of the plaintiff's default. The contract expressed what the law would have adjudged without it; and shall it be said, because the parties spread out in the contract those rights and liabilities which were substantially the legal consequences flowing from the contract, that therefore other conveyances shall be made to attach, which otherwise would not? Suppose the provision about rescinding had been left out of the contract, and in all other respects it remained, as it is—with, as I think is undeniable, time of payments essential—the covenant to pay independent—the payment of the money by the plaintiff made a condition precedent to the execution of a deed, &c.; the plaintiff makes default, and no further time is given by the defendants, and nothing occurs from which a waiver of strict performance can be inferred: I ask what is the party to do? He sees no prospect of his money being paid, and perhaps the plaintiff is bankrupt. I suppose he would have a right at once to treat the contract as rescinded, and sell the property to another, or to bring his action of ejectment and recover the possession, and the plaintiff would be without relief, either at law or in equity, in relation to the money advanced or the premises sold. At all events there can be no doubt but he would have a right to treat the agreement as rescinded upon reasonable notice to the vendee, to make payment, &c. This would be as liberal a view of the case in favor of the vendee as any of the authorities justify, even in cases where time is not of the essence of the contract. And I should think, under the circumstances of this case, looking at the amount of the payment which had become due, and the nature of the contract,

Proseus v. McIntyre.

that thirty days' notice would not be unreasonably short. The time, in such cases, where nothing is to be done but paying money, should be such as to allow the party an opportunity to raise it by negotiating a loan or collecting it in from places where he may have it in deposit, and allowing reasonable time for remittance. He is not entitled to take time to earn the money. Now this is substantially provided for in the agreement, and I cannot see how that circumstance can vary the rights or liabilities of the parties.

I think one good test of the vendee's right to recover in these cases is his right to a specific performance of the contract upon his paying up what may be due. And judging this case by that criterion, I hazard nothing in saying that no adjudged case, nor any respectable dicta can be found which would entitle this plaintiff to the relief he asks for.

In my opinion, the nonsuit was properly granted, and the motion to set it aside should be refused.

MAYNARD, P. J. dissented.

Motion denied.(a)

(a) The above decision was affirmed by the Court of Appeals, in December, 1849

MONROE GENERAL TERM; January, 1849. *Johnson, Welles,*
and Selden, Justices.

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PROSEUS and others, administrators of Proseus, and others, *vs.*
MCINTYRE.

Upon the naked fact that a father buys and pays for land, and has the deed thereof made to an infant child, the inference of law is that it is an advancement to the child, and not a resulting trust in favor of the father. But it is always competent to meet and repel such inference by proof that the father did not intend it as an advancement. *Per WELLES, J.*

Proseus v. McIntyre.

In such cases the question is one of intention entirely. *Per* WELLES, J.

Voluntary conveyances are effectual as between the parties, and cannot be set aside by the grantor, although he afterwards becomes dissatisfied with the transaction.

Where land is purchased by a father, and paid for by him, but the conveyance is made to his son, by the direction of the father, for the purpose of defrauding the creditors of the latter, no trust will result in favor of the father in consequence of his having paid the consideration money; but as between the father and son and those claiming under the father, such conveyance is absolute, and vests in the son the entire legal and equitable estate.

But the fact that the father, in such a case, paid the whole purchase money of the land, forms a good moral or conscientious consideration for a parol agreement, subsequently made, between the father and the grantee, and another son, for the division of the land between the two sons. And after the two sons have acted under such agreement, for several years, and recognized each other's interests in the respective parcels, and expenditures have been incurred in consequence of such agreement and division, and upon the faith of it, the grantee in the original conveyance will not be allowed to repudiate such agreement, and to claim the whole premises by virtue of his deed.

IN EQUITY. The bill in this cause was filed on the 28th of April, 1840, by John Proseus, who was then alive, to compel a conveyance by the defendant of the east half of the north half of lot number three in second range of lots in township number fourteen in the first range of towns in the county of Wayne, the whole lot number three containing about three hundred and twenty-four acres. The answer of the defendant was put in on the first of February, 1841, to which a general replication was filed on the 9th of the same month. Afterwards, and before any further proceedings were had in the cause, John Proseus died. On the 4th Monday in July, 1843, by an order of the court of chancery, the suit was revived in the names of Ira Proseus and Anson Proseus, administrators of, &c. of John Proseus, deceased, with the will annexed. Proofs were then taken in the cause, for the plaintiffs and defendant, and on the 22d day of June, 1847, the proofs were closed. The cause was noticed for hearing at a special term of this court held in Monroe county on the 3d day of January, 1848, at which term the hearing was ordered to be had at a general term. The hearing was brought on at a general term held in Cayuga county on the 3d Monday of January, 1848.

Proseus v. McIntyre.

Upon the argument the court held that the cause had not been revived in the name of the proper parties, and an order was entered that the plaintiffs have leave to file a bill of revivor and supplement in the names of the present plaintiffs, and that the proofs taken be read upon the final hearing. The bill of revivor and supplement was accordingly filed on the 11th of March, 1848, and an order was entered on the 10th day of July, 1848, taking the last mentioned bill as confessed.

The facts will sufficiently appear in the opinion of the court.

Lyman Sherwood, for the plaintiffs.

W. H. Adams, for the defendant.

By the Court, WELLES, J. The facts, as I regard them, established by the pleadings and proofs, are substantially as follows: On or about the 19th day of May, 1817, Sanford Williams and wife, by deed of that date, conveyed to the defendant, who was then a minor under the age of twenty-one years, the north half of said lot number three, including the premises in question, for the consideration of \$815. The purchase of this land of Williams was made by William McIntyre, the father of the defendant, and the consideration or purchase money paid to Williams by said William McIntyre. At the time of such purchase and conveyance, William McIntyre was considerably embarrassed with debts incurred principally by becoming security for other persons, and the deed was made to the defendant, his son, by directions of the father, in order to prevent its being made liable to his debts. At the time of the purchase from Williams, William McIntyre lived on a farm in the town of Seneca, Ontario county. Afterwards he removed with his family to a farm in Sodus, Wayne county, about three miles from the land bought of Williams, and resided there until his death, which took place about May, 1836. The farm in Sodus, of which he was in possession when he died, he held under a contract of purchase from John Greig. It was called the homestead farm. On or about the 25th day of August,

Proseus v. McIntyre.

1823, said William McIntyre obtained a loan of \$230 from the commissioners of loans of Ontario county, to secure which, the defendant gave a mortgage upon the west half of the land purchased of Sanford Williams. Sometime afterwards and after William McIntyre had removed to the town of Sodus with his family, and while they were living upon the premises purchased of Greig, before the defendant was married and while he was living with his father, a verbal arrangement was entered into between William McIntyre the father and his sons, the defendant and John R. McIntyre, to the effect that the defendant should have the west half, and John R. the east half; and that John should pay the mortgage of \$230 to the commissioners of loans, whenever it should be called for, and pay the interest annually in the meantime. That the defendant should have from the property of the said William McIntyre a yoke of oxen, a yoke, chain, plough and drag, one or two cows, half a dozen sheep, three or four hogs, and provender for the same for a year, and his store bill was to be paid for him for one year. Upon John's paying off the mortgage to the loan commissioners, the defendant was to convey him the east half of the land, being the premises in question. In pursuance of that agreement, the defendant shortly afterwards went into actual possession of the west half, built a house upon it, and has continued to reside upon it ever since. At the time he went on, the personal property, the oxen, &c. which, by the arrangement, he was to have, were furnished him from the farm of his father. The defendant employed a surveyor to run a division line north and south through the land bought of Williams, dividing it equally; he paying one half of the expense of the survey, and John the other half; the defendant, from that time recognizing the line so run as the division line between him and his brother John, and occupying up to it. After the defendant moved on to the west half of the land purchased of Sanford Williams as aforesaid, John R. McIntyre took possession of the east half, built a log house on it worth fifty dollars, and made other improvements thereon, and occupied it by a tenant for some time, and until the 22d of February, 1834, when he

Proseus v. McIntyre.

contracted in writing to sell it to John Proseus, the original plaintiff in this suit. By the contract between John R. McIntyre and Proseus, the latter was to pay for the land the sum of \$8 per acre, with interest upon what should remain due from the 15th day of April following the date of the contract, as follows: \$50 by the 10th day of March next, after the date of the contract; \$100 and interest on the same, by the first day of October then next; the residue of what the land should amount to, in four equal annual instalments, with interest on each instalment, to commence one year from the 1st day of October then next, and Proseus to pay all taxes, &c. and to be at liberty to go into possession at any time he chose, and to remain in possession until he should make default in paying, &c. The tenant whom John R. had on the premises, at the time he sold to Proseus, was in under a contract for five years, and was paid \$40 to give up possession to Proseus. Soon after the execution of the contract of sale with Proseus, and in the spring of 1834, Henry Proseus, the son of John Proseus, went into possession of the east half, &c. under his father John Proseus, and has continued so in possession under his father, ever since. John Proseus paid, on account of the purchase money, on the date of the contract, \$20; on the 10th of March, \$30; on the 26th November, 1834, \$60; on the 3d January, 1835, \$40 principal, and \$4.25 interest; October 28th 1835, \$50; March 17th, 1836, \$33; May 26th, 1836, \$22.25; November 16th, 1836, \$150; and May 31st, 1838, \$100. The defendant knew of the sale by John to Proseus after it was made, and was present when the \$100 was paid by the latter to the former on the contract, on the 31st of May, 1838. John R. McIntyre paid up the interest on the mortgage regularly until May, 1838.

In the month of March, 1839, the defendant obtained a loan of \$500, by mortgaging the west half of the premises, out of which he paid the mortgage of \$230, amounting, at the time of such payment, with interest, to \$244.30, the payment of the principal of such mortgage not having been called for. In January, 1840, the defendant commenced an action of eject-

Proseus v. McIntyre.

ment to recover possession of the east half, against Henry Proseus, who was in possession under his father John Proseus, whereupon the bill in this cause was filed and a temporary injunction issued to restrain the defendant from proceeding in the ejectment suit until the further order of the court, &c. Shortly previous to the commencement of the ejectment suit, Henry Proseus, in behalf of his father, offered to pay the defendant the amount he had paid to remove the mortgage to the loan office, with interest, which the defendant refused to receive. The defendant, after the arrangement between his father and his brother John, in regard to the land purchased of Sanford Williams, repeatedly and at various times, declared to various persons that the west half belonged to him, and the east half to his brother John; and said to one witness, after John had sold to Proseus, and who he was letting have some wood from the land, that he must not go farther east than the line, pointing out to him the line which had been run, and saying to him "all east of that line we have sold to Mr. Proseus."

It would seem that the defendant never contemplated holding the east half of this land, until after his father's death; and there does not appear in the evidence any justifiable motive for his discharging the loan office mortgage, the interest of which his brother John had regularly kept paid up, and the loan was a permanent one, and the principal had not been called for. If it was for an investment of his money, and he was willing to become the creditor in place of the commissioners of loans, it would all have been well enough, provided he had been willing to give the same credit as could have been obtained from the loan commissioners. But it seems to me that neither John nor Proseus could be regarded as in default, so long as the interest was punctually paid, until after the loan commissioners had called for the principal. The particulars of the arrangement between William McIntyre and his two sons John and Samuel is proved by Hugh McIntyre, the brother of William. He swears the arrangement took place in his presence, between the three parties to it, at William McIntyre's, in Sodus, Wayne county, in February, 1829 or 1830, and when the defendant

Prosser v. McIntyre.

and his brother John were living at home with their father, William McIntyre, and when they were both single men. Hugh also testifies that he was at his brother William McIntyre's the last three days of his life, at which time he asked the witness if he recollected the conversation before had respecting the division of the Williams lot between the boys. That witness told him he did; that his brother went on and repeated it, and told the witness he wished him to remember it. He thought he should live but a few days, and thought there might be trouble about it. That his brother died the next day. The testimony of this witness is assailed in two ways. First, by contradicting him. The testimony on the part of the defendant shows that in 1829, Samuel was a married man, and that his marriage took place probably in January, 1828. If this was so, then Hugh is mistaken in the time of the first conversation, by one or two years, or in the fact which he states that Samuel was then a single man. I do not think this is a circumstance which, taken alone, amounts to any thing. He was testifying, in July, 1844, in relation to a conversation which took place, if at all, some 16 or 17 years before, and it would be somewhat remarkable if, without having made a memorandum of the time, or having any fixed date to connect it with, he should have been entirely accurate as to the time. It is rarely that men can, without some aid, and from mere memory, preserve greater accuracy in dates.

Evidence was also given to show that William McIntyre, during the last three days of his last sickness, was insensible and incapable of conversing intelligibly on any subject. On this point it is to be remarked that it sufficiently appears that the witness Hugh, his brother, was with him during the last three days of his life. That he was with him more than any other person, and that it appears by some of the witnesses that William McIntyre did converse some, and knew the persons attending upon him. The witnesses who testify against his capacity, give their opinions merely as to the state of his mind, which is at all times the most unreliable evidence on such a question, unless by a medical witness. Besides, there is not on

Proseus v. McIntyre.

this subject a uniformity of opinion among the witnesses. On the supposition that Hugh is correct in his account of the first conversation, it is not at all improbable that his brother, in view of his approaching death, should have adverted to the subject; and he would be more likely, in all probability, to speak of it to his brother Hugh than to any one else.

Second; the testimony of Hugh McIntyre is assailed by an attempt to show that his character is so bad as to render him unworthy of credit. This attempt, I think, has not succeeded. Some impression is indeed made upon his character, and I am not prepared to say it stands as fair as if it had not been attacked. Nevertheless it is not to be disguised that his bad character is confined to a comparatively small circle, and seems to be connected with a business difficulty he had some years ago, with one or more of the individuals of that circle. He was a man 52 years of age, and was quite extensively known in Ontario and Wayne counties, in both of which he had lived many years, and quite a number of witnesses, especially in Ontario county, where he had spent the most of his life, and where he had resided several years next before his examination, gave him a fair character.

If the case rested upon the testimony of Hugh alone, it would not be sufficient to found a decree upon, because the agreement which he swears to is denied in that part of the answer which is responsive to the bill, and which answer is put in under oath, in pursuance of a prayer of the bill that the defendant should so answer. But his testimony is so strongly corroborated in all its parts, as to leave no doubt, upon my mind, of its truth. Evidence from a large number of other witnesses cumulate, in a remarkable degree, to fortify and corroborate his statements. All the acts and declarations of the defendant, from the purchase of the land from Williams, by his father, until after the death of the latter, and until shortly before the commencement of the action of ejectment, are entirely consistent with the view presented by the bill, and are irreconcilable with any other. I have, therefore, no difficulty in coming to the conclusion that, in point of fact, the case

Proseus v. McIntyre.

made by the bill is substantially sustained by the evidence in the cause.

It abundantly appears that this land was purchased of Sanford Williams by William McIntyre, the defendant's father, and paid for by him, and that the deed was made to the defendant as grantee, by his father's directions, for the reason that the father was embarrassed with debts, and for the purpose of preventing the land from becoming liable for those debts. That the father kept the deed in his possession and controlled the land, until about the time the defendant went into possession of the west half, a period of nine or ten years, when, as the defendant says in his answer, he took possession of the deed from his father's drawer, where it had been kept among his other papers.

Upon the naked fact, that a father buys and pays for land and has the deed made to an infant child, the inference of law is that it is an advancement to the child and not a resulting trust to the father. But it is always competent to meet and repel such inference, by proof that the father did not intend it as an advancement. In such cases, the question is one of intention entirely. In the present case, there is nothing to show that William McIntyre, the father, intended this land as an advancement to his son Samuel, excepting the mere facts that the deed was made to him, and that he was a minor at the time. Those facts, and the inference claimed to arise from them, are, I think, satisfactorily met and explained. At the time the purchase was made a different reason was assigned by the father. It is proved that about that time he was embarrassed with debts and his property sold on executions. Then all the subsequent declarations and transactions of the defendant and his father and of John R. McIntyre, under whom the plaintiffs claim, completely contradict the idea that the deed had been taken in the defendant's name for his sole benefit, or as an advancement to him alone.

If the land was not intended as an advancement to the defendant, a resulting trust would have been created in favor of William McIntyre the father, excepting for the considerations

Proseus v. McIntyre.

hereinafter mentioned. As the law now stands, under the revised statutes, there would be no resulting trust in favor of the person paying the money. (1 R. S. 722, § 51.) But the transaction took place, and the rights of William McIntyre and his two sons Samuel and John became vested long before the revised statutes took effect, and the case must be governed by the law as it stood before. It may be questionable whether this conveyance from Sanford Williams to the defendant was not void as against the creditors of William McIntyre, it having been made, as the proof shows, by his directions, to the defendant, with the express intent of keeping it beyond the reach of such creditors; and if void as to them, whether William McIntyre or those claiming under him can set up a resulting trust as against the defendant.

The rule in regard to voluntary conveyances is that they are effectual as between the parties, and cannot be set aside by the grantor, although he afterwards becomes dissatisfied with the transaction. (1 *Story's Eq. Jur.* § 371.)

In regard to the question whether, in order to make a conveyance void as against creditors, it is indispensable that it should make a transfer of property which could be taken in execution by the creditors, or compulsorily applied to the debts of the grantor; or whether the rule equally applies to the conveyance of any property whatsoever, of the grantor, although not directly so applicable to the discharge of debts, is one which has given rise to some diversity of judicial opinion.

The English doctrine upon the subject seems to be in favor of the former proposition; namely, that in order to make a voluntary conveyance void as to creditors, it is indispensable that it should transfer property which would be liable to be taken in execution for the payment of the debts, for the reason that such conveyance could not be injurious to creditors, because it would not withdraw any fund from their power which the law had not already withdrawn from it. (*Story's Eq. Jur.* § 367, and cases there cited.)

In the case of *Bayard and others v. Hoffman and others*, (4 *John. Ch. Rep.* 45,) Chancellor Kent held a different doc-

Proseus v. McIntyre.

trine, and decided that a voluntary settlement, either of lands or chattels, by a person indebted at the time, is void as against creditors. In that case, the property assigned, and as to which the assignment was held to be void as against creditors, was stock of the United States; an article which, by the common law, could not be taken in execution. The decision was put upon the ground that although choses in action may not in the first instance be levied upon by virtue of an execution at law, yet by the aid of a court of equity, they may be made subject to the payment of the judgment. I prefer to follow the case of *Bayard v. Hoffman*, as it seems to me supported by the better reasoning, and is based upon a wholesome public policy, and sound legal morality.

But this case, I think, may be easily and safely decided upon its own intrinsic circumstances, and without holding that a trust resulted to William McIntyre, in consequence of his paying the consideration money. If it were necessary to hold that a trust resulted to William McIntyre, I do not see how the plaintiff could get along without making the rest of the children of William McIntyre the father, parties. There is one other son besides Samuel and John, and four married daughters. Before the Williams premises could be definitely disposed of between Samuel and John, and John's vendees, by a decree of this court, the other children should be made parties if there was a resulting trust to William, the father. If by the deed from Williams to Samuel, the latter became vested with the absolute fee as against his father and those claiming under him, it is a question between the parties to this suit and John R. McIntyre only, the latter of whom should have been made a party. And no decree can be made until that is done; unless the difficulty can be obviated, as hereinafter mentioned.

I am of the opinion therefore, that no trust resulted in favor of William McIntyre the father upon the conveyance by Sanford Williams to Samuel McIntyre, in consequence of the former having paid the consideration money; for the reason that the conveyance was made to Samuel by direction of his father, with a view to defraud his creditors; and that as be-

Proseus v. McIntyre.

tween Samuel and William and those claiming under him, the conveyance was absolute, and vested in William the entire legal and equitable estate.

The fact that William McIntyre paid the whole purchase money formed a good moral or conscientious consideration or inducement for the parol arrangement proved, in regard to the disposition and division of the land to and between the defendant and his brother John R. McIntyre; and inasmuch as the parties have acted under it for a series of years, and as considerable expenditures have been incurred in consequence and upon the faith of it, and important rights have become vested under it, it would be inequitable and unconscionable to allow the defendant to break it all up; especially when it appears that the other parties interested are not in any respect in default.

I think, therefore, that the defendant is not entitled to hold the east part or half of the land in question. But I think that John R. McIntyre should have been made a party to the bill, either as plaintiff or defendant. He has a right to be heard before the defendant shall convey the land in question to another person, which he has sold by contract. He has an interest in the question whether the purchase money has been paid by Proseus, and I do not see how a decree can be made without his being brought before the court. In no event, can a decree be made for a deed from the defendant, excepting on payment to him of the amount he has paid to discharge the loan office mortgage, with interest thereon.

Another question of no small embarrassment to me, is as to whom the conveyance shall be made by the defendant, in case the foregoing difficulty in relation to parties, can be obviated.

John Proseus is dead. He left a will by which he gave to his wife, in case she survived him, the control of his real and personal estate during her life, with the right to dispose of the same excepting a certain 90 acres where he resided, as she might deem proper in order to pay claims against his estate and to support the family. After his wife's death, the 90 acres were

Proseus v. McIntyre.

to go to his sons Anson, Jonas and Ira, subject to and upon condition of their paying certain legacies to his other children and grandchildren, and in case they should decline taking it upon those conditions, or should neglect paying the legacies as directed, then his executors were to sell the 90 acres and divide the proceeds among his children and grandchildren in certain proportions specified in the will. And in case his wife should not sell the McIntyre lot, (the premises in question in this suit,) his executors were to sell his interest in the same after his wife's death and to pay out the proceeds in the manner directed in the will. The testator also grants to his wife full powers of substitution during her life, in all matters of real and personal estate excepting the power of disposing of the above mentioned 90 acres of land. The executors named in the will have renounced, and letters of administration have been issued by the surrogate of Wayne county to Ira Proseus and Anson Proseus, as administrators, &c. with the will annexed. Hannah Proseus, the widow, has since, by an instrument under seal, duly executed and acknowledged, released to the administrators all her right, interest and claim under the will, and all her right, interest and claim in the real and personal estate of the said John Proseus, deceased, and all claim of dower in his real estate; and by the same instrument vesting in the administrators all the power they would have in relation to the real and personal estate under the will in case of her death.

Upon the whole I incline to think that in case a conveyance shall be made by the defendant to carry out the covenants of John McIntyre, made with John Proseus in his lifetime, in relation to the land in question, it should be made to Ira Proseus and Anson Proseus, as administrators of, &c. of John Proseus deceased, with the will of the deceased annexed, in trust to execute the provisions of the will, &c.; the form of the deed to be settled under the direction of one of the justices of this court, or a referee to be appointed, &c.

With respect to the difficulties suggested about parties, I am disposed, if it can be done, to relieve the plaintiffs from any further expense in the way of amendment of their bill in that

Proseus v. McIntyre.

respect. If the plaintiffs will procure the said John R. McIntyre to come personally before the referee hereafter named, and consent in writing that a final decree be made in this cause, the same as if he had been made a party thereto, and waiving his right to be made such party, such consent to be under seal and to be acknowledged in like manner as conveyances of real estate are required to be acknowledged, and to be returned and filed as a part of the referee's report, in such event, that it be referred to George H. Middleton, Esq. county judge of Wayne county, to inquire and report how much has been paid to the said John R. McIntyre upon his contract with John Proseus, and how much remains due and unpaid, including interest, if any thing. The referee also to ascertain and report what sum is due to the defendant on account of the payment by him to the commissioners of loans, in satisfaction of his mortgage to them, mentioned in the pleadings, including interest from the time of such payment to the date of the report. But in case the plaintiffs shall fail to procure the consent before mentioned, to be executed, acknowledged and returned in the way suggested, the referee is to do nothing further under such reference than to report such failure.

The plaintiffs may at their election, take such an order as above directed, or an order that the cause stand over for the purpose of bringing in the said John R. McIntyre by an amended bill and process thereon, as a defendant in this suit. All other questions to be reserved until after the referee's report.

SCHENECTADY GENERAL TERM, January, 1849. *Paige, Willard, and Hand, Justices.*

STEWART vs. McMARTIN.

Where a grantor, by a deed of trust, directed the trustees named therein to invest a sum of money, and, after the death of J., to pay the interest thereof quarterly to M. B. and J. B., and to pay the principal sum at the deaths of M. B. and J. B., to their children respectively, and in case either of the *cestui que trust* should die without leaving issue, her share to go to the children of the survivor; Held that the interest of M. B. in the annuity, after the death of J. and of J. B. without leaving issue, was not liable to the claims of her creditors, and could not be reached by a creditor's bill.

Where a trust is created by one person for the benefit of another, and the fund held in trust proceeds from the person making the trust, and the *cestui que trust* has no control over the trust fund, but has only a beneficial interest in the income thereof, which the donor intended should be applicable to her support and maintenance, such trust comes within the terms of the exception in the 38th section of the title of the revised statutes relative to the court of chancery, as well as within its spirit and meaning, although the interest of the *cestui que trust* is not rendered inalienable by the 63d section of the article relative to uses and trusts.

A devise in a will executed previous to the revised statutes, of land to trustees, in trust to permit M. so long as she shall live, or during the minority of her youngest child, to enjoy the rents and profits of the land, for her benefit and the maintenance of the children, and directing that after M.'s death or the arrival of the youngest child at the age of 21, the lands shall be sold, or divided equally between M. and the testator's then surviving children, is not void as being an illegal suspension of the power of alienation.

A right of dower, before assignment, is a chose in action, within the meaning of section 39 of the title of the revised statutes relative to the court of chancery, and may be reached by a creditor's bill.

IN EQUITY. This cause was heard on bill and answer. The bill was an ordinary creditor's bill, in the usual form. The bill called for a discovery of the defendant's property, upon oath. The defendant, by her answer, discovered that her father Thomas Bell, of Glasgow, Scotland, in 1802, conveyed all his property, real and personal, to three trustees, and among other things, directed his trustees to lend out £500 sterling, upon hereditary security and to take the securities in their own names for the behoof of his son James Bell, or to make payments of the annual interest thereof to him during his life,

Stewart v. McMartin.

either half-yearly, quarterly or oftener, as the trustees might think proper; and in the event of his death without leaving a widow or lawful issue, the trustees were directed to lend out the said £500, sterling for behoof of the defendant and Jean Bell, daughters of the said Thomas Bell, and to make payments to them quarterly of the interest arising thereon exclusive of the *jus mariti* of the defendant's husband, and to make payment of the principal sum at the death of the defendant and Jean Bell, to their children, each family drawing one half, and failing either of them by decease without leaving lawful issue of their body, then wholly to the children of the survivor, payable upon their attaining the years of majority. Thomas Bell died in September, 1802. Jean Bell died in January, 1821, without issue. James Bell died in December, 1832, leaving a widow but no children; and his widow died in 1840. The defendant further stated that the trustees had paid to her agent on account of said annuity or the interest of the said £500, up to May, 1840, £35,2,7 sterling; that since the death of James Bell's widow the annuity payable to her amounted annually to £25 sterling; and that she received the same up to the month of May, 1844; that on the 15th day of May, 1845, there was due her for such annuity £25, 5 8 for which she received in October, 1845, a certificate of deposit in the Commercial Bank of Scotland, to the credit of Prime, Ward & King, for the use of the defendant, in the form of a draft by said bank on said Prime, Ward & King, in favor of the defendant, which had not been paid or presented for payment. The defendant further stated that her youngest child became of age on the 22d of October, 1845; and she claimed that the said annuity could not by virtue of sections 38 and 39 of the revised statutes, (2 R. S. p. 179,) be reached by her creditors. The defendant also stated in her answer that her husband, Finley McMartin, died in September, 1825, seised of real estate, leaving 11 children by the defendant him surviving; that all of such children were living; that her husband, on the 31st of September 1825, made his will and devised to three persons as trustees all his lands, hereditaments and messuages, with

Stewart v. McMartin.

the rents, issues and profits therefrom, in trust to suffer and permit the defendant, so long as she should live, or during the minority of their youngest child, for her own benefit and the maintenance of the children, to enjoy all the rents and profits of the lands devised ; and that after the defendant's demise or the arrival of the youngest child to the age of 21 years, the said lands should be sold or divided equally between the defendant and the testator's then surviving children. And the testator directed in his will that the said trustees should, when his youngest child became of full age, sell and convey in fee simple all his said lands, &c. The defendant further stated in her answer, that since the death of her husband, she had had the management of the real estate of her husband, and had received the rents and profits thereof, and had applied the same, as well as the annuity received by her as aforesaid, to the support of herself and children ; that no dower had ever been assigned to her ; that she had never claimed any dower in the real estate of her husband, and was advised that she had no right of dower therein. And the defendant further stated in her answer that she had no means of support except the aforesaid annuity received from Scotland and her interest in the real estate of her husband. And she claimed that her interest in the real estate of her husband could not be reached by her creditors.

S. Belding, Jun. & C. B. Cochran, for the plaintiff.

D. P. Corey & J. W. Van Derveer, for the defendant.

By the Court, PAIGE, P. J. The first question which arises upon the pleadings in this cause is, whether the beneficial interest of the defendant in the income of the £500 sterling directed by the trust deed of her father, Thomas Bell, to be invested by the trustees named therein, in the event of the death of James Bell without leaving a widow or lawful issue, is liable to the claims of her creditors. Thomas Bell directed his trustees to lend out £500 sterling, and to take the securities in their names, and to pay the annual interest thereof to his son James Bell during

 Stewart v. McMartin.

his life; and in the event of his death without leaving a widow or lawful issue, to lend out the same money and pay the interest thereof quarterly to the defendant and her sister, Jean Bell, and to pay the principal sum at the death of the defendant and Jean Bell to their children respectively, and in case either died without leaving lawful issue of her body, her share to go to the children of the survivor, payable on their attaining the years of majority. No objection is made by either the counsel of the plaintiff or of the defendant to the validity of this trust. Both, in their written arguments, concede its validity, and that the defendant is entitled to at least a part of the income of the £500 sterling. There is no evidence in the case showing what the laws of Scotland are, on the subject of trusts. By the articles of union agreed to by the parliaments of England and Scotland in 1707, (6 Anne,) it was provided that the municipal laws of Scotland should remain in force until altered by the parliament of Great Britain. And these laws not having, except in a few instances, been altered, still continue in force. They differ from the laws of England. And the common law of the latter country has no force or validity in Scotland. (1 *Black. Com.* 95 to 99.) The law of the place where a contract is made or is to be performed, governs as to the nature, validity, construction and effect of the contract. If valid there, it is valid every where, with the exception of cases in which the contract is immoral, or unjust, or in which the enforcement of it in a state would be injurious to the rights, interest, or convenience of such state or its citizens. (*Andrews v. Herriott*, 4 *Cowen*, 517, *note*.) The *lex domicilii* governs as to the disposition of personal property. Its transmission by succession, or the act of the owner, follows the law of the domicile of his person, and not the law of the country where the property is. A will of personal property must be executed according to the *lex domicilii*. If void by that law, it will not pass personal estate in another country, although executed with all the formality of its laws. (4 *Cowen*, 517, *note*. 4 *John. Ch.* 460. 3 *Id.* 190. 5 *Paige*, 596.) The *lex rei sitæ* governs real property; the title to which can be acquired and lost only in the manner pre-

Stewart v. McMartin.

scribed by the law of the country where it is situated. (4 *Cow.* 527.) And it is a general rule that the laws of a foreign country must be proved, and that our courts will not take judicial notice of them. (*Id.* 525, 6, *note.*) What effect the leaving of a widow by James Bell, on his death, has, by the laws of Scotland, on the interest of the defendant in the income of the £500, does not appear. As no question is raised in the case, as to the validity of the trust, or of the provision in favor of the defendant, I will regard the trust as valid, and will deem it conceded that the defendant is entitled to her share of the income of the £500, according to the terms of the trust deed. By the terms of that deed the defendant is entitled to one half of the income of the £500, payable quarterly during her life. The question whether the children of the defendant are entitled to a moiety of the £500, the income of which was given to Jean Bell, she having died before the occurrence of the contingent event on the happening of which her interest in the income was to vest, does not arise in this case. The provisions of chap. 1 of part 2 of the revised statutes in relation to real property, &c. are by sec. 11 (1 *R. S.* 750,) expressly rendered inapplicable to any deed or will which shall have taken effect before that chapter should be in force as a law. (1 *R. S.* 773, §§ 1, 2, 1st *ed.*) Therefore section 63, (*Id.* 730,) rendering the interest of a *cestui que trust* in a trust, &c. inalienable, would not have been applicable to the interest of the defendant in the trust in question, even if the validity and construction of the deed of trust were to be determined by the laws of this state. Under the laws of this state in force before the adoption of the revised statutes, the beneficial interest of the defendant in a moiety of the income of the £500, after the same became a vested interest, would, sections 38 and 39, (2 *R. S.* 174,) being out of the question, pass to her assignees in bankruptcy or under our insolvent laws, or to a third person by her own voluntary assignment, and consequently it could be reached upon a creditor's bill. (*Bryan v. Knickerbacker*, 1 *Barb. Ch. Rep.* 430, 431.) In the case cited the fund held in trust proceeded from and was created by, the debtor himself. That case, therefore, was not

Stewart v. McMartin.

embraced by sections 38 and 39 of the revised statutes. (2 R. S. 174.) These sections except from the operation of a creditor's bill, property held in trust for the debtor, where the trust has been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself. In this case the trust was created by, and the fund held in trust proceeded from, Thomas Bell, the father of the defendant, and not from the defendant herself. These sections of the revised statutes are applicable to all trusts, whether created before or subsequent to the adoption of these statutes. It being conceded that there is a valid trust in this case, created by a third person for the benefit of the defendant, and the fund held in trust having proceeded from such third person, such fund cannot be reached by the plaintiff's creditor's bill. In *Bryan v. Knickerbacker*, (1 Barb. Ch. Rep. 427, 431,) the chancellor expressly forbears to pass upon the question, whether the creditors of the debtor could have reached his interest in the trust property in that case, if the trust fund had proceeded from, or been created by, some person other than himself. But the plaintiff's counsel contend that the annuity or income payable to the defendant, is no part of the trust fund protected by the statute, and that as soon as it becomes due and payable, it is liable to the claims of her creditors. Such a construction would render the 38th and 39th sections of the revised statutes (2 R. S. 174) entirely nugatory. When a trust is created for the support and maintenance of the cestui que trust, the only interest the cestui que trust generally has in the trust fund is in the income thereof; and if, the moment such income accrues, and is payable to the cestui que trust, or is applicable to his use, it can be intercepted by his creditors and applied to the payment of his debts, the whole object of the trust will be defeated. Where an express trust is created under section 55 of the revised statutes (1 R. S. 728) to receive the rents and profits of lands, or the income of personal property, and apply the same to the use of any person, or to pay the same over to the cestui que trust after they have accrued and been received by the trustee, a sum necessary for the support and education of the cestui que trust

Stewart v. McMartin.

cannot be reached by his creditors, either by anticipation, or after the rent or income has actually accrued, whether it remains in the hands of the trustee or has been received by the cestui que trust. (1 R. S. 729, §§ 55, 57, 63. *Clute v. Bool*, 8 Paige, 86, 87. 1 Barb. Ch. Rep. 427.) It is only the surplus beyond the sum necessary for the education and support of the cestui que trust, after it is ascertained that it is not wanted, and has not been applied to his support as it became due, that is liable in equity to the claims of creditors. (8 Paige, 87. 1 R. S. 729, § 57.) Sections 38 and 39 (2 R. S. 174) ought at least to receive a construction as favorable to the cestui que trust as that given to sections 55, 57 and 63. (1 R. S. 729, 730. *Hallett v. Thompson*, 5 Paige, 587.)

It is not pretended in this case that the annuity payable to the defendant under the trust deed of her father is more than is necessary for her support. The defendant, in her answer, states that this annuity and her interest in the real estate of her husband, are her only means of support. I therefore conclude that this annuity is not liable to the claims of the creditors of the defendant, and that it cannot be reached by the plaintiff's bill.

I am aware that the chancellor, in *Hallett v. Thompson*, (5 Paige, 586,) intimates that the exception contained in the last clause of the 38th section of the revised statutes relative to the court of chancery, (2 R. S. 174,) applies only to trusts where the interest of the cestui que trust in the trust property is, under the 63d section of the article relative to uses and trusts, inalienable. In that case the will took effect after the adoption of the revised statutes, and the debtor had the absolute control of the trust fund itself, sought to be reached by his creditors. It was not the case of a trust to secure to the legatee a support out of the interest of a trust fund which should be inalienable by the cestui que trust; but a case where the fund itself was perfectly under the control of the debtor, and who could obtain payment thereof whenever he pleased. In this case the defendant has no control over the trust fund. She has only a beneficial interest in the income thereof; which the donor undoubt-

Stewart v. McMartin.

edly intended should be applicable to her support and maintenance. It comes within the terms of the exception of the 38th section, (2 R. S. 174,) and I think within its spirit and meaning. In *Clute v. Boal*, (8 Paige, 83,) the chancellor held that under the 55th section of the revised statutes, (1 R. S. 728,) a valid trust could be created, to receive the rents and profits or income of property, and to apply the same to the use of the cestui que trust by paying the same over to him in money, after such rents and profits or income had accrued and been received by the trustee. And Ch. J. Nelson expressed the same opinion in *Hawley v. James*, (16 Wend. 118, 119.) Bronson, J. in 16 Wend. 156, 157, and Savage, Ch. J. in 14 Wend. 265, intimated a different opinion.

Chief Justice Nelson and Justice Bronson, in 16 Wend. 118, 165, held that an annuity payable out of the rents and profits or income of trust property was an interest inalienable, under the 63d section of the article relative to uses and trusts. And Chancellor Walworth concurred in this opinion, in *Clute v. Boal*, (8 Paige, 86.)

The remaining questions in this case arise under the will of Findlay McMartin, the husband of the defendant. It is contended by the counsel of the defendant that the devise to the trustees in trust to permit the defendant, so long as she should live, or during the minority of her youngest child, for her benefit and the maintenance of the children, to enjoy the rents and profits of the lands devised, and that after the defendant's death, or the arrival of the youngest child at the age of 21, the lands should be sold, or divided equally between the defendant and the testator's then surviving children, is void, being an illegal suspension of the power of alienation. The will in question took effect before the adoption of the revised statutes. Its validity, therefore, is not to be determined by such statutes. By the common law the absolute ownership of real property could be suspended during the continuance of a life or any number of lives in being at the creation of the estate, and of 21 years after, and nine months in addition, for the birth of a posthumous child. (4 Kent's Com. 267, 17. 2 Cowen, 333. Fearn v.

Stewart v. McMartin.

Cont. Rem. 445 and note.) The devise in question, therefore, is not void on account of any illegal suspension of the power of alienation. It would probably have been valid under the revised statutes, as it was only a devise in trust to permit the defendant to receive the rents and profits of the lands devised, during her life, or for a shorter period, if the youngest child arrived at the age of 21 before the death of the defendant. (2 *Barb. Ch. Rep.* 506.) But the title of the trustees, being merely nominal, and not connected with any power of actual disposition, or management, the legal estate in the lands devised, by virtue of the 47th section of the article in relation to uses and trusts, passed to the defendant for the period prescribed for the continuance of the trust, viz. during the life of the defendant, or the minority of her youngest child. This legal estate was subject to the same condition as her beneficial interest in the lands devised, viz. the maintenance of her children. The defendant's youngest child having arrived at the age of 21, her legal estate in the whole premises has terminated. And the premises, under the will, now belong to the defendant and her 11 children equally, as tenants in common, either for life or in fee, subject to a power in trust given to the trustees by the testator to sell the same; and subject also to a right of dower of the defendant in eleven-twelfths of that part of the premises of which the testator died seised in fee. The testator did not declare, in express terms, that the devise to the defendant should be in lieu of dower; nor is any such intention of the testator deducible by clear and manifest implication from the provisions of the will. The defendant is not therefore compelled to elect between her dower and the devise in her favor, but is entitled to both. (See *Adsit v. Adsit*, 2 *John. Ch. Rep.* 450; *Church v. Bull*, 2 *Denio*, 430; *Sampson v. Jackson*, 10 *Paige*, 206; *Wood v. Wood*, 5 *Id.* 596.) The case of *Tompkins v. Fonda*, (4 *Id.* 448,) decides that a right of dower, before assignment, is a chose in action, within the meaning of section 39 of the title of the revised statutes relative to the court of chancery, (2 *R. S.* 174,) and may be reached by a creditor's bill.

Stewart v. McMartin.

The conclusions at which I have arrived are, that the annuity payable to the defendant under the trust deed of her father cannot be reached by the plaintiff's bill; but that her estate in remainder in one-twelfth of the premises devised by the will of her husband, and her claim of dower in the remaining eleven-twelfths of the real estate of which her husband died seised in fee, must be applied in satisfaction of the plaintiff's judgment.

It is doubtful whether the words of the will, directing that the lands, on the arrival of the youngest child at the age of 21 years should be sold, or divided equally between the defendant and the testator's then surviving children, gave to them an estate in fee or for life only. (*Bool v. Mix*, 17 *Wend.* 119. 13 *Id.* 578. *Jackson v. Buel*, 10 *John.* 148. *Smith v. Berry*, 8 *Ham. Ohio Rep.* 365.) Neither is it clear that the devise in the will, by the testator, of all his lands, hereditaments and messuages, passed to the devisees the interest of the testator in his leasehold lands. (1 *Wash.* 800. *Executors of Aylett v. Aylett*, 1 *Hil. Ab.* 1, 2, 3. 2 *Id.* 347, 528. *Johnson v. Stagg*, 2 *John.* 522.) These questions were not discussed by the counsel for the parties; and I shall not dispose of them on this occasion. If the leasehold lands of the testator did not pass under his will, they went to his executors to be applied and distributed as personal estate; and the surplus, after payment of his debts, the executors are bound to distribute among the next of kin of the testator; to one third part of which the defendant is entitled, as the widow of the testator. If these leasehold lands passed under the will, the defendant acquired, as devisee, an estate in the whole of such lands during the minority of her youngest child, with a remainder for the unexpired term in one equal twelfth part thereof, to take effect on the arrival of such youngest child at the age of 21. In the lands of which the testator died seised in fee, the defendant acquired, under the will, a beneficial interest in the whole rents and profits thereof during life or the minority of her youngest child, with a vested estate in remainder either for life or in fee in one equal twelfth part of such lands; to take effect on the expiration

Stewart v. McMartin.

of the minority of such youngest child, subject to be increased by the death of any of the children previous to that time. As all the children survived the expiration of the minority of the youngest child, her interest in the lands devised is now a vested estate for life or in fee in one equal undivided twelfth, and a right of dower in the remaining eleven-twelfths. The 11 children took, under the will, a vested estate in remainder, either for life or in fee, in eleven-twelfths of the lands of which the testator died seised in fee, subject to be divested as to any one of them who might die before the expiration of the minority of the youngest child.

A decree must be entered directing a reference to a referee in the county of Montgomery to appoint a receiver, and directing that after the appointment of a receiver, the defendant assign to him, for the purposes of this suit, her right of dower in the lands of which her husband died seised in fee; and authorizing the receiver to proceed in her name for the recovery and assignment of her dower; and directing that after such dower has been assigned the receiver be let into the possession of the lands assigned to the defendant for her dower, and receive the rents and profits thereof until the further order of this court. Such decree must also direct that the defendant assign to the receiver, generally, all her property, real and personal, with the exception of the annuity payable to her under her father's trust deed, and of such property as is exempt by law from sale on execution. The decree must also contain the usual provisions inserted in final decrees on creditors' bills.

SAME TERM. *Before the same Justices.*

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THE PEOPLE *vs.* ROWLAND.

Where the subscribing witness to a deed or other written instrument is out of the jurisdiction of the court, proof of his hand-writing is sufficient evidence of the execution of the deed or instrument, without any proof of the hand-writing of the parties therein named.

Information derived from the subscribing witness himself, of his being a resident of another state, is competent and sufficient evidence of his being out of the jurisdiction of the court.

In all cases there must be a strict, diligent, and honest inquiry made for the subscribing witness, satisfactory to the court, under the circumstances of the case, before proof of his hand-writing will be received.

The answers given to inquiries respecting the witness' residence may be given in evidence; they being not hearsay, but parts of the *res geste*.

A surrogate may order the bond of an executor or administrator to be prosecuted, for a refusal or omission of the executor or administrator to perform a decree made by such surrogate, without any previous service upon the executor or administrator, of a copy of the decree, or a citation to appear and show cause why an order for the prosecution of such bond should not be made.

If the surrogate is satisfied that there has been either a refusal or an omission, on the part of the executor or administrator, to perform a decree made against him for rendering an account, or upon a final settlement, or for the payment of a debt, legacy, or distributive share, he is authorized to make an order for the prosecution of the bond of such executor, or administrator, without any proof of a demand of the money directed by the decree to be paid.

In an action of debt on bond, the plea of *non est factum* only puts in issue the execution of the bond. It admits every other allegation in the declaration.

It is no objection to a recovery upon the bond of an executor or administrator that the decree of the surrogate, for the non-performance of which such bond was ordered to be prosecuted, does not state the names of the general guardians of the infant children to whom the money is to be paid.

THIS was an action of debt, on an administrator's bond, given by one Nancy Newkirk as administratrix, &c. and by the defendant and one James Greenman, as her sureties. The bond was in the usual form, required by the revised statutes. (2 R. S. 77, § 42, 1st ed.) The defendant pleaded *non est factum*, with notice that the defendant would give in evidence, &c. that the administratrix was not cited to show cause why the bond should not be ordered to be prosecuted, by the surrogate, &c.; that no copy of the decree of the surrogate directing the

The People v. Rowland.

payment of money, &c. set forth in the declaration, was served on the administratrix, previous to making the order to prosecute, &c. and no previous demand was made requiring her to pay the money directed in the decree, &c. On the trial the plaintiff offered in evidence the bond given by the defendant and the administratrix, and proved by G. F. Van Vechten that he was acquainted with T. A. Stoutenburgh, the subscribing witness; and also with his hand-writing; that his name subscribed to the bond was his proper hand-writing; that by reputation the subscribing witness resided in the state of Virginia; that before he removed from this state he resided in Johnstown; that it was understood there that he resided in Virginia; that the witness had seen Stoutenburgh since he removed to Virginia, and he informed the witness that he resided in Virginia. To this evidence the defendant objected, but the objection was overruled and the evidence received. The defendant then insisted that the plaintiff was bound to prove the hand-writing of the obligors of the bond. The justice decided that the proof of the hand-writing of the subscribing witness to the bond was sufficient proof of its due execution, without proving the hand-writing of the obligors. The defendant excepted to this decision. The plaintiff's counsel then introduced in evidence a decree of the surrogate of the county of Montgomery, on a final settlement of the account of Nancy Newkirk as administratrix, &c. in which he decreed her to pay certain moneys in her hands, in equal portions, to and among the children and next of kin of the intestate, or to their legally constituted guardians. The plaintiff's counsel then introduced in evidence an order of the surrogate, made *ex parte*, directing the prosecution of the bond of the administratrix. The defendant insisted that the plaintiff could not recover unless he proved that a copy of the decree of the surrogate was duly served on the administratrix, previous to granting the order for the prosecution of the bond, and that she had been cited to appear before the surrogate to show cause why the order for the prosecution of the bond should not be granted, before such order was made. The justice decided that the plaintiff was entitled to recover without

The People v. Rowland.

any such proof; and the defendant excepted. The defendant offered to prove that the administratrix was not cited to appear before the surrogate, at the time of granting the order for the prosecution of the bond, and had no opportunity to show cause against such order. This proof was rejected, and the defendant excepted. The defendant also offered to prove that no copy of the decree was served on the administratrix, previous to the making of the order for the prosecution of the bond; nor any demand of the money directed in the decree to be paid, made on her, before the commencement of the suit. This evidence was rejected, and the defendant excepted. The defendant also insisted that the plaintiff could not recover, because the decree did not state the names of the legal guardians of the infant heirs of the intestate to whom the money was to be paid; and that the administratrix, being the mother of the infant heirs, was entitled to hold their shares of the money directed to be paid, until legal guardians were appointed for such heirs. But the justice held otherwise, and the defendant excepted. The jury found a verdict for the plaintiff; and the defendant, on a bill of exceptions, moved for a new trial.

S. Belding, Jun. & C. B. Cochran, for the plaintiffs.

H. & F. Fish, for the defendant.

By the Court, PAIGE, P. J. The evidence of the residence of the subscribing witness to the administrator's bond, in the state of Virginia, was sufficient to authorize proof of his hand-writing, and proof of his hand-writing was evidence of the execution of the bond by the obligors. Where the subscribing witness to a deed or other written instrument is out of the jurisdiction of the court, proof of his hand-writing is sufficient evidence of the execution of the deed or instrument, without any proof of the hand-writing of the parties therein named. (1 *Phil. Ev.* 473, 4, 5. 11 *Wend.* 98, 99, 115, 123. 13 *Wend.* 183, 196.) The information of the residence of Stoutenburgh, the subscribing witness, in the state of Virginia, was derived from

The People v. Rowland.

the witness himself. This was competent and sufficient evidence of his being out of the jurisdiction of the court. Diligent inquiry at the former residence of a subscribing witness, and information obtained from his former neighbors, as to his removal and place of residence if out of the state, is a sufficient excuse for the non-production of the witness. (19 *Wend.* 165. 9 *Cowen*, 149.) In all cases there must be a strict, diligent and honest inquiry for the subscribing witnesses, satisfactory to the court under the circumstances of the case. The answers given to such inquiries may be given in evidence, they being not hearsay, but parts of the *res gestæ*. (1 *Greenl. Ev.* § 574. 2 *Cowen & Hill's Notes*, 1298, 9, &c.) No question was raised, on the trial, as to the identity of the obligors. No evidence of identity, therefore, was necessary. (1 *Phil. Ev.* 475.) The excuse for the non-production of the subscribing witness is addressed to the court, and parties to the suit are competent to testify as to such excuse. (2 *Cowen & Hill's Notes*, 1295, 1298.)

The revised statutes (2 *R. S.* 116, § 20; *Act of 1830*, ch. 320, p. 116, 1st ed. and p. 178, 3d ed.) provide that whenever an executor, &c. shall *refuse or omit* to perform any decree made against him by a surrogate, &c. for rendering an account, or upon a final settlement, or for the payment of a debt, legacy or distributive share, such surrogate may cause the bond of such executor, &c. to be prosecuted, and shall apply the moneys collected thereon in satisfaction of such decree, in the same manner as the same ought to have been applied by such executor, &c. This provision does not require the service on the executor or administrator of a copy of the decree, or a citation to appear and show cause why an order for the prosecution of the bond of the executor or administrator should not be made, previous to the making of any such order. If it is made to appear satisfactorily to the surrogate, that there has been either a refusal or an omission to perform the decree, he is authorized to order the prosecution of the bond, without any previous service of a copy of the decree, or of a summons on the executor or administrator to show cause. The order proved on the trial

The People v. Rowland.

recites that the petition of Palmer Newkirk, one of the heirs, duly verified, on which the order was founded set forth a service on the administratrix, of a copy of the decree and a demand by the petitioner of the sum decreed to be paid to him, and her refusal to pay. This was sufficient evidence of a refusal to perform the decree, and authorized the surrogate to make an order for the prosecution of the bond of the administratrix. A demand, previous to the commencement of the suit, of the money directed by the decree to be paid, was not necessary. The statute does not make such demand a condition precedent to the right to sue the bond of the administratrix. Without any proof of a demand, the surrogate had authority to make an order for the prosecution of the bond. He was only to be satisfied that there had been either a refusal or an omission to perform the decree. The pleadings in this suit admit such refusal and omission on the part of the administratrix. The declaration alleges both a refusal and an omission to perform the decree; and the plea and notice do not controvert this allegation. The plea of *non est factum* only puts in issue the execution of the bond. It admits every other allegation in the declaration. (10 *Wend.* 204, 205. 1 *Chit. Pl.* 483, 4, 5.) The notice annexed to the plea does not set up any denial of the allegation in the declaration, of a refusal and omission to perform the decree, nor any averment of the payment of the moneys directed by the decree to be paid. It was no objection to the plaintiff's recovery that the decree did not state the names of the general guardians of the infant children, to whom the money was to be paid. If all the children of the intestate had been minors, and no general guardian had been appointed for any of them, there could not have been any such refusal or omission to pay which would have authorized the surrogate to order the prosecution of the bond of the administratrix, as there would have been no person to whom she would have been justified in paying the money. (2 *R. S.* 98, § 80, 1st ed.) But one of the children, (Palmer Newkirk,) was an adult, and entitled to receive his share of the money directed to be paid by the decree. There was therefore a refu-

The People v. Rowland.

sal and omission by the administratrix to pay him ; which was a breach of the bond. On the trial, the defendant did not ask the judge to instruct the jury to confine the assessment of the damages to the amount due to Palmer Newkirk. I am inclined to believe, that such a direction of the judge would have been improper. It would seem from the provision of the revised statutes before referred to, (2 R. S. 178, § 20, 3d ed ; § 23 of ch. 320 of Act of 1830,) that the legislature intended, that when the bond was prosecuted by the direction of the surrogate, the surrogate should receive the moneys ordered to be paid by the decree, and apply them in satisfaction of the decree, in the same manner as they ought to have been applied by the executor or administrator. And sections 80 (2 R. S. 98) and 49 (*Id.* 91, 1st ed.) provide that, where there is no general guardian, the surrogate shall direct the share of such minor to be invested in permanent securities, and shall keep the same in his office. And when a general guardian is appointed, he may of course direct that they be delivered over to such guardian. I think that the surrogate had jurisdiction of the subject matter, and was authorized to make the order for the prosecution of the bond. If that order, however, was erroneously made, the remedy of the defendant was by an application to the surrogate to vacate it. Until vacated, it was a valid order, and binding on the parties. There was no exception taken to the direction of the judge to the jury, to assess the damages to the whole amount due to all the children of the intestate. The only question in the case which, in my judgment, involves any doubt, arises out of this direction. But as no exception was taken to it, we cannot grant a new trial on this ground, even if we think the learned judge in this direction committed an error.

The motion for a new trial must be denied.

SAME TERM. *Before the same Justices.***FRINK vs. GREEN and others.**5 455
83h 402

Where no consideration is expressed in a deed, or written contract, parol evidence may be given of the actual consideration, in order to give effect to the deed or contract, if such deed or contract is not within the statute of frauds.

So where a consideration is expressed in a deed or written contract, another or a different one may be proved.

A release of one of two or more joint debtors, whether they are bound jointly or jointly and severally, discharges the original contract as to all; and may be pleaded in bar of an action on the contract. But the releasee, to have this effect, must be a technical release under seal.

A covenant not to sue one of the joint obligors or promisors, does not amount to a release, but is a covenant only. It does not, at law, discharge either of the joint obligors or promisors; and a suit may, notwithstanding such covenant, be brought upon the original contract, against all, if it was a joint contract, or the one to whom the covenant was not given, if the contract was joint and several.

THIS cause was tried before Justice WILLARD, at the Saratoga circuit, in August, 1848. The suit was brought upon two joint promissory notes for \$50 each, dated November, 10, 1843, given by the defendants Green, Alonzo Hyde, James E. Spier and John Ellsworth, to the plaintiff, payable, the one, one year after date to the plaintiff or bearer; and the other two years after date, to the plaintiff or bearer. Green and Hyde signed the notes as sureties for the other drawers. The defendant gave in evidence an instrument in writing in the following words: "Milton, April 2d, 1844. I hereby exonerate Mr. Alonzo Hyde from three fifty dollar notes which I hold against the said Hyde, John Ellsworth, James Spier and Daniel D. A. Green. Azor P. Frink." The plaintiff's counsel objected to the introduction in evidence of the writing, on the ground that it was void, for not expressing any consideration, or being under seal. Thereupon the counsel for the defendant offered to prove by parol, that such instrument in writing was executed upon a good and sufficient consideration, which passed between the parties at the time of its execution, and was a part of the whole agreement, a portion of which was expressed in such writing. This evidence was objected to by the plaintiff, and

Frink v. Green.

was rejected by the justice, upon the ground that the consideration of the instrument could not be shown by parol. To which decision the defendant excepted. The justice then instructed the jury to find a verdict for the plaintiff, and they found such verdict accordingly. The defendant, upon a bill of exceptions, moved for a new trial.

W. L. Avery, for the plaintiff.

W. A. Beach, for the defendant.

By the Court, PAIGE, P. J. The instrument in writing given by the plaintiff to the defendant Green, purports, on its face, to be a complete agreement between the parties. This is not the case of an agreement resting partly in writing and partly in parol. Parol evidence of a consideration, therefore, was not admissible as suppletory evidence of the part of an agreement resting in parol, where the whole contract had not been reduced to writing. (*Potter v. Hopkins*, 25 Wend. 419. *Cowen & Hill's Notes*, p. 1471 to 1473. 8 Wend. 116, 117. 4 Wash. C. C. Rep. 289.) In *Parkhurst v. Van Cortland*, (1 John. Ch. Rep. 283,) Chancellor Kent held that a contract could not rest partly in writing and partly in parol. And Thompson, J. expressed the same opinion in *Hoves v. Baker*, (3 John. 509.) But Nelson, Ch. J. expressed a different opinion in *Potter v. Hopkins*, (25 Wend. 419.) The principal question in this case is whether parol evidence was admissible to show the consideration of the writing given by the plaintiff to Green. The writing, it will be observed, is silent as to any consideration. No rule of evidence is better settled, than that which declares that parol evidence is inadmissible to contradict, or substantially vary, a written agreement. Such evidence, independently of the statute of frauds, is contrary to the maxims of the common law. (*Stevens v. Cooper*, 1 John. Ch. Rep. 429. 1 Phil. Ev. 561.) But the rule excluding parol evidence to contradict or vary the terms of a deed, or other written contract, has not been applied with great strictness to the consideration clause. The

Frink v. Green.

question as to what extent the consideration of a deed, or other written contract, may be inquired into, has long been debated in both the English and American courts. It is laid down in Phillips' Evidence, (1 vol. 549,) that a consideration contrary to or inconsistent with that expressed in the deed, cannot be shown; but that another consideration consistent with the one expressed, may be averred and proved. As where in a deed of bargain and sale it is expressed generally, that the deed is made "for divers good considerations," it may be averred that the bargainee gave to the bargainor money, or other valuable consideration. In *Schermerhorn v. Vanderheyden*, (1 John. 139,) it was held that where the consideration is expressly stated in the written contract, parol evidence to show a greater or different consideration, is inadmissible. This proposition was reaffirmed in *Howes v. Baker*, (3 John. 506,) and it was again affirmed in *Maigley v. Hauer*, (7 Id. 341.) In the latter case the court say "it is a settled rule that where the consideration is expressly stated in a deed, and it is not said also, 'and for other considerations,' you cannot enter into proof of any other, for that would be contrary to the deed." (1 John. Ch. Rep. 370, 380. 6 Cowen, 690.) In *Shepherd v. Little*, (14 John. 210,) and in *Bowen v. Bell*, (20 Id. 338,) it was held that whether the consideration specified in the deed to have been paid, was in fact paid or not, was open for inquiry by parol proof. The acknowledgment of the receipt of money, in a deed, was regarded in these cases as being like an ordinary receipt for money, which may be either explained or contradicted. (7 Cowen, 334. 3 John. 320. 14 Id. 212. 9 Cowen, 266.) But in both *Shepherd v. Little*, and in *Bowen v. Bell*, the principle, that where one species of consideration is expressed, you cannot prove another or a different one, was expressly adopted.

In *McCrea v. Purmort*, (16 Wend. 460,) in the court of errors, the doctrine of the inadmissibility of parol evidence to contradict or vary the consideration clause of a deed or other written contract, underwent a radical change; and the principle that where one species of consideration is expressed. another or a different one cannot be proved was entirely, and dis-

Frink v. Green.

tinently overruled; and the contrary rule was adopted, allowing an unlimited latitude of inquiry into the consideration of deeds and other written contracts. In *McCrea v. Purmort* the deed stated a consideration of money in hand paid; and the chancellor received parol evidence to show that the consideration was iron and not money, and the court of errors sustained the chancellor's decision. Mr. Justice Cowen, who delivered the prevailing opinion in that case, reviewed the English and American cases on the subject, and came to the conclusion that the consideration clause of a deed or other written contract could in all cases be explained or contradicted, where the object was not to defeat the deed or contract, or to change their legal effect. He says "a party is estopped by his deed. He is not permitted to contradict it; so far as the deed is intended to pass a right, or to be the exclusive evidence of a contract, it concludes the parties to it. But the principle goes no further. A deed is not conclusive of every thing which it may contain. For instance, it is not the only evidence of the date of its execution, nor is its omission of a consideration conclusive evidence that none passed. Nor is its acknowledgment of a particular consideration an objection to other proof of other and consistent considerations. And by analogy, the acknowledgment in a deed, that the consideration had been received, is not conclusive of the fact." The foregoing authorities relate to cases where a consideration was expressed in the deed. Where no consideration is expressed in the deed, I believe, that the party claiming under it has always been allowed to prove by parol a valuable consideration; such proof not being deemed contrary to the deed. (1 *Phil. Ev.* 549, 550.) In *Peacock v. Monk*, (1 *Ves.* 128,) no consideration was expressed in the deed; and Lord Hardwick held that, the plaintiff who claimed the benefit of a trust under the deed, could prove a valuable consideration, as no consideration was expressed in the deed. The same principle has been adopted by the courts of Massachusetts, Pennsylvania, Vermont, North Carolina and Alabama. It has been held in these states, where no consideration is expressed in the deed or written contract, that the true

 Frink v. Green.

consideration may be shown by parol, and effect be given to the deed or contract accordingly. (*Davenport v. Mason*, 15 *Mass Rep.* 85. *Tisdale v. Harris*, 20 *Pick.* 12. *White v. Weeks*, 1 *Penn. Rep.* 486. *Hartley v. McNulty*, 4 *Yeates*, 95. *Stevens v. Griffeth*, 3 *Verm. Rep.* 448. *Hall v. Mott*, *Brayt.* 81. *Wood v. Beach*, 7 *Verm. Rep.* 522. *Jones v. Soper*, 1 *Dev. & Bat.* 466. *Mead v. Steger*, 5 *Porter*, 498.)

Chancellor Kent, in 4 *Kent's Com.* 465, says that in a modern conveyance to uses the consideration need not be expressed, but it must exist. And if the deed be brought in question the consideration may be averred in pleading, and supported by proof. In *Jackson v. Fish*, (10 *John.* 456,) it was held to be sufficient to prove that a deed of bargain and sale was founded on a valuable consideration, although none was expressed. The same principle was advanced in *Jackson v. Pike*, (9 *Cowen*, 69,) and in *Wilson v. Betts*, (4 *Denio*, 208.)

No consideration is expressed in the writing in this suit, executed and delivered by the plaintiff to Hyde. Where this is the case, the above authorities show that parol evidence may be given of the actual consideration of the written agreement, in order to give it effect, if it is not within the statute of frauds. It is apparent, therefore, that in this case, parol evidence of the consideration of the writing in question should have been received, on the trial.

The written agreement in this case does not come within the statute of frauds, which declares every agreement embraced by it void, unless it expresses the consideration. (2 *R. S.* 135, § 2.)

But conceding that a consideration had been proved, sufficient to uphold this instrument as a valid agreement between the parties, would it have constituted any defence to this action? A release of one of two or more joint debtors, whether bound jointly or jointly and severally, discharges the original contract as to all; and may be pleaded in bar of an action on the contract. But the release, to have this effect, must be a technical release under seal. (*De Zeng v. Bailey*, 9 *Wend.* 336. *Roxley v. Stoddard*, 7 *John.* 207. 4 *Wend.* 365.) A

Frink v. Green.

covenant not to sue one of the joint obligors or promisors does not amount to a release, but is a covenant only. It does not, at law, discharge either of the joint obligors or promisors; and a suit may, notwithstanding such covenant, be brought upon the original contract against all, if it was a joint contract, and against the one to whom the covenant was not given, if the contract was joint and several. (7 *John*. 210. *Hosack v. Rogers*, 8 *Paige*, 237.) An agreement not to sue one of several joint debtors, does not injure the other joint debtors. It does not defeat the right of the debtor sued to compel contribution from his co-debtors. It is not in the power of the creditor to alter the law between joint debtors. (*Catskill Bank v. Messenger*, 9 *Cowen*. 38, *per Savage*, Ch. J.)

The writing in this case, given by Frink to Hyde, is not a release under seal. And if it was given upon a sufficient consideration, it could only operate as an agreement not to sue Hyde; which, as we have seen, would not discharge either of the joint makers of the notes, at law, or prevent a suit against all, upon such notes. (*Jackson v. Stackhouse*, 1 *Cowen*, 122. *Harrison v. Wilcox & Close*, 2 *John*. 446.) In *Jackson v. Stackhouse*, the creditor, by a writing, in terms released and discharged the obligor from all liability on the bond. But the writing expressed no consideration, and was not under seal. And Woodworth, J. held that if a consideration had been stated, the writing would have been construed as only a covenant not to sue.

If, then, the defendant Green had been permitted to prove, and did prove, that the writing given to Hyde, by Frink, was given upon a good and sufficient consideration, it would have been no defence to the plaintiff's action. Even if founded upon a valuable consideration, it was inadmissible evidence for the defendant Green. It was no bar to the plaintiff's recovery against him. It did not discharge him, or any of his co-makers, from liability. It did not discharge or extinguish the notes. It did not defeat, or even embarrass, his remedy for contribution, against his co-surety, or his remedy over against the principal makers of the notes. Not only then should the evidence as to the consideration have been excluded, but the writing itself,

Bradford v. Corey.

and all evidence in relation thereto, should have been rejected. If we grant a new trial this writing cannot be received in evidence in behalf of the defendant Green, as a defence to the plaintiff's action. I cannot, then, conceive what benefit a new trial can be to the defendant. Being of this opinion, I think the motion for a new trial should be denied. What effect a valid covenant by the plaintiff, not to sue one or both of the principal makers of the notes, would have on the liability of the sureties, it is not necessary to determine; as the question does not arise in this case.

Motion for new trial denied.

SAME TERM. *Before the same Justices.*

BRADFORD vs. COREY, impleaded, &c.

The addition of the words "surety" or "security" by the endorers of a note, to their names, does not divest them of their character of endorers. The only effect of the addition of these words, to their signatures, is to give them the privileges of sureties, in addition to their rights as endorers.

As endorers they cannot be made liable without a demand and notice. And as sureties they are entitled to all the privileges of that character. If they endorse the note severally, they cannot be either joint endorers or co-sureties.

Where a note is endorsed by several persons, severally, the endorers are liable in the order in which their names stand upon the note.

In the case of several endorers, they may be sued jointly, under the statutes of 1832, ch. 276, and of 1837, ch. 93, as different parties to the note—several and not joint endorers—and in such action the plaintiff need not declare specially on the note, although the defendant declared against, endorsed the same as *surety* for the drawers; but may give the note in evidence under the money counts.

THIS was a motion on the part of the plaintiff to set aside the report of a referee made in favor of the defendant Corey. The suit was commenced in 1844, by a declaration containing the money counts alone, on a joint note given by Abraham

Bradford v. Corey.

Shuler and Francis Newkirk to Henry Randall or bearer, dated December 17, 1836, payable two years after date, and endorsed by Martin J. Borst, David P. Corey, and Timothy Livingston. Corey affixed to his name the word "surety," and Livingston the word "security". A copy of the note was added to and served with the declaration. The declaration was made out against all the drawers and endorsers. It was not served on either of the drawers; nor on Borst, the first endorser. Corey appeared and pleaded separately. Payment of the note was regularly demanded when it fell due, and notice of non-payment was duly served on all the endorsers. Evidence was introduced before the referee, tending to show payment of the note by Borst, the first endorser, before the commencement of the suit. The note was given by Shuler and Newkirk the drawers, to Randall the payee, on the purchase of a store of goods by them from Randall. Corey endorsed the note as security. Shuler, Newkirk, and Borst all failed, and were discharged under the bankrupt act, in 1842 or 1843. Borst, by arrangement with the drawers in the fall of 1838, assumed the payment of the note. It was objected, on the hearing, that the note was not admissible in evidence under the money counts; the defendant Corey having endorsed the note as surety. The referee, after hearing the evidence, without passing upon the facts of the case, decided in favor of the defendant Corey, upon the sole ground that the note was not admissible in evidence under the declaration.

D. Wright, for the plaintiff.

D. P. Corey, defendant in

By the Court, PAIGE, P. J. An endorser of a promissory note, although in the nature of a surety, is not, for all purposes, entitled to the privileges of that character. He is answerable upon an independent contract, and it is his duty to take up the note when it is dishonored. (6 *Wend.* 613. 8 *Id.* 199. 9 *Cowen*, 206. 21 *Wend.* 504. 16 *John.* 152. *Id.* 72, 40.)

Bradford v. Corey.

The endorser, when duly fixed, ought to pay the note, without waiting to be sued. If he permits himself to be sued, it is his own fault, and he cannot resort to the drawers for indemnity against the costs of the suit. (*Simpson v. Griffin*, 9 John. 131.) In some respects there is a resemblance between an endorser and a surety; in others there is none. (6 Wend. 613.) The undertaking of an endorser is conditional: it is to pay, if the maker of the note does not, upon being required to do so when the note falls due, and upon the further condition that the endorser be notified of such default. But if an endorser endorses a note for the accommodation of the drawer, to enable him to borrow money, the endorser is regarded as a surety for the drawer, and the latter, by implication of law, undertakes to save the endorser harmless of and from all expenses and costs to which he may be subjected in consequence of his endorsement. And in such case the endorser can charge the drawer with the costs of a suit for the collection of the note which he may have been compelled to pay. (15 John. 273. 7 Bing. 217. *Jones v. Brooke*, 4 Taunt. 466. 16 John. 70. 1 Greenl. Ev. § 401. *Edwards v. Low*, 8 Bar. & Cress. 407.) But although an endorser stands in the relation of a surety to the drawer, in consequence of an endorsement of an accommodation note, or of a special promise of the latter to save him harmless, he does not lose his character of endorser, as respects the holder of the note. And he cannot be made liable on the note, without a demand and notice. He continues endorser, with all the privileges of a surety. In this case, the addition of the word *surety*, or *security*, by Corey and Livingston, to the endorsement of their names on the note in question, did not divest them of their character of endorsers. The only effect of the addition of these words to their signatures was to give them the privileges of sureties, in addition to their rights as endorsers. As endorsers they could not be made liable without a demand and notice. And as sureties they were entitled to all the privileges of that character. But inasmuch as they endorsed the note severally, they cannot be either joint endorsers or co-sureties. The note being payable to bearer does not make their

Bradford v. Corey.

liability a joint one. They endorsed the note before it became due, and probably at the time it was made. Their endorsement is a several one; and they must be deemed liable as endorsers in the order in which their names stand upon the note. If Corey and Livingston are several endorsers, the suit was properly brought against them jointly, under the statutes of 1832, ch. 276, and of 1837, ch. 93. They were different parties to the note; several, not joint endorsers. They could not have been sued jointly at common law. The action against them is a statute action, and not an action at common law. This being so, the note was admissible in evidence under the money counts in the plaintiff's declaration. (*Butler v. Rawson*, 1 *Denio*, 105. *Miller v. McCagg*, 4 *Hill*, 35.) The suit being properly brought, under the statutes of 1832 and 1837, the case of *Butler v. Rawson* is not applicable. It was not necessary—the suit being brought under these statutes—to declare against Corey specially on the note, although he endorsed the note as a surety for the drawers. The referee, therefore, erred in deciding that the note was not admissible, under the declaration. The referee did not pass upon any of the facts of the case. His report in favor of the defendant was made upon the sole ground that the note was not admissible, under the declaration.

The report must be set aside, and the case must be referred back to the referee.

Motion granted.

SAME TERM. *Before the same Justices.***PAYNE vs. BARNES.**

A warrant issued by a justice for the arrest of a person charged with larceny, which recites a distinct charge of larceny against the accused, is not rendered invalid by the omission of an allegation as to the value of the property stolen.

The only effect of such an omission is, that the offence charged will be deemed to be petit instead of grand larceny, and a magistrate of the county in which the person accused is arrested, will be authorized to admit him to bail.

All the statute requires is that the warrant shall recite the accusation. And the accusation need only charge that a criminal offence has been committed. If therefore, it charges a criminal offence generally, viz. that of larceny, it is sufficient to authorize the issuing of a warrant, although the accusation omits to state the value of the property.

The recital in such warrant, of the complaint, is presumptive evidence of the fact that such complaint has been made.

An omission in a warrant of arrest, which is merely clerical, and is apparent, and which does not mislead any one, or prejudice the defendant, will not render such warrant invalid.

THIS was an action for false imprisonment, against the defendant, for directing the plaintiff's arrest on a criminal warrant. The cause was tried at the Warren circuit in August, 1848, before Justice PARKER. On the 21st of February, 1848, the defendant made a complaint to one Hart, a justice of the town of Watervliet in the county of Albany, that a criminal offence had been committed by the plaintiff. Such complaint was reduced to writing and verified by the defendant. In addition to such complaint, the defendant was sworn and examined by the justice touching such complaint. The justice thereupon issued a warrant for the arrest of the plaintiff. The warrant recited that the defendant had that day made complaint on oath before the justice, that the plaintiff, on or about the 27th day of September, 1847, at the town of Watervliet, &c. feloniously stole, took, and carried away and converted to his own use a pocket book and about \$90 good money mostly of the Cayuga County Bank, and one promissory note of about \$30 or \$40, and other papers of value, all of the value of one hundred — the property of the defendant, &c. The warrant,

Payne v. Barnes.

upon proof of the hand-writing of the justice who issued it, was endorsed by a justice of the county of Warren, and the constable to whom it was originally delivered after the warrant was so endorsed, arrested the plaintiff. Justice Parker, upon this evidence, nonsuited the plaintiff. And the plaintiff now moves to set aside the nonsuit.

A. S. Wilson, for the plaintiff.

H. L. Palmer, for the defendant.

By the Court, PAIGE, P. J. It is insisted, by the plaintiff's counsel, that the warrant issued by Hart was void; because it did not state with certainty the value of the property charged to have been stolen, so as to show whether the offence was grand or petit larceny; and because it did not recite the complaint; and because the complaint did not show that any criminal offence had been committed. The written complaint evidently does not charge the commission of a criminal offence. But the case does not turn upon the defects of the written complaint. It appears that the defendant, before the warrant was issued, was sworn and examined touching such complaint, and in addition thereto, and that thereupon the justice issued the warrant. The revised statutes (2 R. S. 706, §§ 2, 3) do not require that either the complaint, or the examination, should be reduced to writing prior to the issuing of a warrant for the arrest of an offender. Section 2 provides that whenever a complaint shall be made to a magistrate that a criminal offence has been committed, it shall be the duty of such magistrate to examine on oath the complainant, &c.; and section 3 declares that if it shall appear from such examination that any criminal offence has been committed, the magistrate shall issue a proper warrant under his hand, with or without seal, reciting the accusation, &c. In this case it appears that the defendant was examined orally on oath by the magistrate, touching the complaint, prior to the issuing of the warrant. The magistrate, on such examination, adjudged that a criminal

Payne v. Barnes.

offence had been committed, and accordingly issued his warrant for the apprehension of the plaintiff. In deciding whether it appeared from the examination that a criminal offence had been committed, the magistrate acted judicially. The complaint and oral examination of the defendant on oath, gave the justice jurisdiction of the complaint, and authorized him, on deciding that a criminal offence had been committed, to issue the warrant. An error of judgment in making this decision did not invalidate the warrant. (7 *Wend.* 200.) The case must turn upon the validity of the warrant *per se*. And the only question is whether the warrant contained the necessary requisites of a valid process for the apprehension of the plaintiff. Before the adoption of the revised statutes it was not absolutely necessary to set out the charge or offence, in a warrant for the apprehension of the person accused, for examination or trial. (*Atchinson v. Spencer*, 9 *Wend.* 62. 1 *Chit. Cr. Law*, 41, 42. 2 *Hawk. P. C.* 136, § 25. *Bac. Abr. Trespass*, 574, D. 3.) But the revised statutes have altered the common law in this respect. They require that the warrant shall recite the accusation. (2 *R. S.* 706, § 3.) Does the warrant then, in this case, recite an accusation charging the commission of a criminal offence? It states that the defendant had made complaint on oath that the plaintiff, on or about the 27th of September, 1847, at the town of Watervliet, feloniously stole, took, and carried away and converted to his own use a pocket book and about \$90 good money, mostly of the Cayuga County Bank, and one promissory note of about 30 or 40 dollars, and other papers, all of the value of one hundred ———, the property of the defendant. Here is evidently a clerical omission, by inadvertence, of the word "dollars" after the word "hundred." If the word "dollars" had not been omitted there would have been no ground for the objection, that the warrant did not on its face show whether the offence was grand or petit larceny. For in that case the warrant would have contained a precise and certain allegation of the value of the property charged to have been stolen; and the officer who arrested the plaintiff would have known from the face of the warrant whether the grade of the

Payne v. Barnes.

offence charged was such as entitled the plaintiff, under the provisions of the revised statutes, to be bailed by a magistrate of the county of Warren. (2 R. S. 707, §§ 7, 8.) I think the omission of the word *dollars* did not invalidate the warrant. The omission is apparent, and is merely clerical. It could not have misled any one. The case comes within the equity of the provision of the revised statutes that no indictment shall be deemed invalid by reason of any defect or imperfection in matters of form which do not tend to the prejudice of the defendant. (2 R. S. 178, § 52.) The mistake was the mistake of the justice who issued the warrant, and not that of the defendant. It is evident that the defendant had no knowledge of the mistake. A party to a suit in a justice's court is not answerable for the issuing of process by a justice, unless he directs or sanctions it. (*Taylor v. Trask*, 7 Cowen, 249.) In this case there would have been no pretence of a cause of action against the defendant, if he had not interfered in the arrest of the plaintiff.

But in my judgment the warrant would have been a valid process without an allegation of the value of the property. Independent of that allegation it recited a distinct charge of larceny against the defendant; a charge coming within the common law definition of the offence, viz. that the plaintiff had feloniously taken and carried away the personal property of the defendant. (4 Black. Com. 230. 2 Russ. on Cr. 1032, 3.) The only effect of an omission to state, in precise terms, the value of the property, is, that the offence charged will be deemed to be petit instead of grand larceny, and a magistrate of the county in which the person accused is arrested, will consequently be authorized to admit the latter to bail under the 8th section of the title of the revised statutes in relation to the arrest of offenders. (2 R. S. 707, §§ 7, 8.) All that the revised statutes require, is, that the warrant shall recite the accusation. The accusation need only charge, that a criminal offence has been committed. Larceny, whether grand or petit, is a criminal offence. If the complainant, therefore, omitted to state, in

 Quackenbush v. Ehle.

his examination, the value of the property stolen, inasmuch as he charged a criminal offence generally, that of larceny, it was sufficient to authorize the issuing of a warrant. And the warrant, as it recited the accusation, in the form in which it was made, was necessarily valid.

The recital, in the warrant, of the complaint, was presumptive evidence of the fact that such complaint had been made. (1 Barb. Cr. Law, 445. 17 Wend. 181.)

The motion to set aside the nonsuit must be denied.

SAME TERM. *Before the same Justices.*

QUACKENBUSH vs. EHLE, ex'r of Quackenbush.

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83h	405
5	469
93h	276

5	469
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The report of a referee is like the verdict of a jury. It is conclusive, upon questions of fact, where there is no decided preponderance of the evidence in favor of the party against whom it is made.

Where a father promised his son that if he would build a house, upon the farm of the former, for two families, and would stay and work such farm during the life of the father, he would devise the farm to the son, by way of compensation for his services; and the son, relying upon such promise, built a house, and remained on the farm, and worked it, for 23 years, and until his father ejected him therefrom; but the father refused to make him any compensation, and died without devising the farm to him; *Held* that an action lay, against the executor of the father, by the son, to recover the value of his services; and that he was entitled to recover on the common count for work and labor.

Held also that the demand of the son, for compensation, was not due until the death of his father; and that if he brought his suit within six years from that time it was sufficient.

Held further, that the case was not within the statute of frauds.

A former suit between the same parties is no bar to a second action for the same demand, where the validity of the plaintiff's claim was not passed upon in the former suit; the referees in that suit reporting against the plaintiff expressly upon the ground that his action was prematurely brought.

Quackenbush v. Ehle.

MOTION to set aside the report of a referee. The action was *assumpsit*. The declaration contained one count on a special contract, in which the plaintiff alleged that the defendant's testator, who was his father, in consideration that the plaintiff would remain with him and aid him in the cultivation of his farm, and would otherwise devote himself to the business of the testator during the testator's life, promised that he would make arrangements, by will or otherwise, that the plaintiff should, at the testator's decease, have the testator's farm, &c. averring performance, and breach, &c. The declaration also contained the common counts for work, labor, &c. The defendant pleaded the general issue and the statute of limitations; and gave notice of a former suit, in bar, and a set-off. The suit was heard by the referee in February, 1848. On the trial before the referee, the plaintiff proved that he worked and managed the testator's farm for him, for about 22 years after he was 21 years of age; and until 1837 or 1838. During this period he erected a dwelling house on the farm, for the testator. While the plaintiff was building the house, the testator said, "the plaintiff builds the house for himself." The house was built at the plaintiff's expense. When he commenced building the house the testator said, he "had told John (the plaintiff) that if he built the house for two families, and stayed and worked the farm he should have the farm, excepting 30 acres," &c. The part that was to go to the plaintiff, was the part on which the house was built. The house was built for two families. After the house was finished, the testator said the plaintiff had built the house, and he meant that the whole farm should go to the plaintiff if he stayed and worked it. In 1837 or 1838 the testator refused to let the plaintiff work the farm any longer, and in Nov. 1841, ejected him from the premises. The testator died in 1843, leaving a will, in which he gave the plaintiff no part of the farm, and only bequeathed to him his blacksmith tools, worth about \$10, and \$1 in money. The testator, before his death, entered into a contract for the sale of the farm to H. Ehle for \$3500. Previous to the death of the testator, the plaintiff commenced a suit against him for work, labor and

Quackenbush v. Ehle.

services; which suit was referred to referees; who reported against the plaintiff, expressly upon the ground that the action was prematurely brought on the part of the plaintiff, and that therefore there was nothing due from the defendant to the plaintiff in that suit. Judgment was entered up on such report for \$113 costs, on the 18th of Oct. 1842. The referee appointed in this cause reported in favor of the plaintiff on the 18th of May, 1848, for \$754.40.

John Cumming, for the plaintiff.

T. B. Mitchell, for the defendant.

By the Court, PAIGE, P. J. The principal question in this case is whether the services of the plaintiff for his father were to be performed gratuitously, or whether the plaintiff and his father, at the time the services of the former were performed for the latter, intended that the plaintiff should be in some way compensated for such services. This was a pure question of fact for the decision of the referee. He has decided that it was the intention of both parties, at the time the services were rendered, that they should be paid for. The report of a referee is like the verdict of a jury. It is conclusive, where there is no decided preponderance of the evidence in favor of the party against whom it is made. (1 *Barb. Sup. C. Rep.* 235. 2 *Hill*, 578. 3 *Id.* 256. 2 *Wend.* 356.) But, I think that the report of the referee in this case is sustained by the evidence. The plaintiff labored for his father about 22 years, and during that period, erected a house at his own expense, for his father, on the farm of the latter. When the plaintiff commenced building the house, his father told him that if he built the house for two families and stayed and worked the farm, he should have the whole of the farm except 30 acres. And after the house was completed, the plaintiff's father said, that the plaintiff had built the house, and he meant that the whole of the farm should go to him, if he stayed and worked it. The plaintiff built the house for two families, and remained on the farm, and worked it until his

Quackenbush v. Ehle.

father refused to allow him to work it any longer, and turned him off. It is apparent, from this evidence, that the understanding of the parties was, that the plaintiff should build the house, and remain on the farm and work it during the life of his father, and that his father, by way of compensation for his services, should devise the whole of the farm to him, or all of it except 30 acres. The plaintiff fulfilled his part of the agreement. But his father neglected to give him his farm, or any part of it, as he had agreed to do, and died without making him any compensation whatever, for his services. The plaintiff's claim for compensation, against the estate of his father, for such services, is founded both in justice and equity. The plaintiff labored for his father during the prime of his life; he increased the value of his farm by erecting a dwelling house upon it; and his father not only neglected to compensate him for such services, but disinherited him. A grosser act of parental injustice cannot well be conceived. There is no foundation for the suggestion that the plaintiff's remuneration was to depend wholly on the will and pleasure of his father. The referee, by his report, has negatived this idea. He has found that it was the understanding of the parties that the plaintiff was to be remunerated for his services. The cases of *Jackson v. The Executors of Lagrange*, (3 John. 199;) of *Patterson v. Patterson*, (13 Id. 379;) and of *Martin v. Wright*, (13 Wend. 460,) fully sustain the report of the referee. In *Jackson v. The Executors of Lagrange*, Van Ness, J. says, "the services having been performed for the benefit of the testator, with his knowledge and approbation, the law implies a promise to pay for them; unless the defendant can show that payment was never intended." The plaintiff is entitled to recover on the common count for work and labor. An action lies on the implied assumpsit of the testator to pay for the work and labor performed by the plaintiff for him.

There is no evidence to sustain the defendant's plea of the statute of limitations. The plaintiff's demand for compensation was not due until the death of his father. And the suit was brought within six years from that time. The case of *Pat-*

Quackenbush v. Ehle.

terson v. Patterson, (13 *John*. 379,) shows that the plaintiff was not entitled to demand compensation until the death of his father.

The statute of frauds has nothing to do with the case. There was no contract for the sale of lands; nor any agreement that, by its terms, was not to be performed within one year. This suit is not founded on any such contract or agreement.

The former suit is no bar to this action. That suit was commenced before the plaintiff's cause of action accrued. It was prematurely brought. And the report of the referees in that suit was made against the plaintiff, expressly upon that ground. (13 *John*. 379.) The validity of his claim for compensation, for his services performed for the testator, was not passed upon in that suit; and the report of the referees and the judgment in such suit were not upon the points litigated in this suit, and did not necessarily involve their consideration and determination. (10 *Wend*. 84. 8 *Id*. 35. 2 *Hill*, 481.) But the case in this suit, does not show what was the subject matter of the former suit, nor what were the points litigated in that suit. The only evidence it furnishes, is the report of the referees, made in that suit, and that a judgment was entered up upon such report. The pleadings in that suit form no part of the case. And there is no proof of the questions of fact which were put in issue, and tried in that suit.

The referee properly disallowed the costs in the former suit for which the testator obtained judgment, as they were not embraced in the defendant's notice of set-off. The demand claimed to be due on the chattel mortgage given by the plaintiff to his father, was properly rejected. The evidence shows that there was nothing due on it, from the plaintiff.

The motion to set aside the report of the referee must be denied, with costs.

OTSEGO SPECIAL TERM, January, 1849. *Mason, Justice.*

WHITE vs. WHITE.

The act of April 7th, 1848, for the more effectual protection of the property of married women, so far as it relates to existing rights of property, in married persons, is unconstitutional and void.

The legislature of the state of New-York can lawfully exercise only such powers as have been confided to it by the sovereign will of the people. *Per MASON, J.* The people have never delegated to the legislature the power to divest the vested rights of property legally acquired by any citizen of the state, and transfer them to another, against the will of the owner. *Per MASON, J.*

THIS was a complaint filed by the plaintiff, who is the wife of the defendant, against her husband, to protect what she claims to be her rights in relation to her real estate, and to restrain the defendant from interfering with the same. The complaint stated that the plaintiff, as the heir at law of Richard Cary, succeeded to certain real estate as tenant in common with seven other of the children of the said Richard Cary; and that the plaintiff married the defendant in 1819, and that there were six children still living, the issue of such marriage. That proceedings in chancery were taken to make partition of the lands among the children of the said Richard Cary, and that such proceedings were had, that on the 23d day of July, 1828, commissioners to make partition were appointed, who assigned and allotted to the plaintiff, as one of the heirs at law of the said Richard Cary, in the names of herself and the said defendant her husband, a certain farm of land known as lot No. 6 containing 100 acres situated in the town of Springfield in the county of Otsego, and also several other farms in said tract, amounting in the aggregate to 470 acres, or thereabouts. That said commissioners made their report of partition and the same was confirmed by the court on the 5th day of December, 1828, and a final decree of partition made, and that the plaintiff took possession of said lot No. 6 so assigned to her, and from that time had continued to reside on and occupy said lot until within the last few weeks, during which time the

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White v. White.

plaintiff had been prevented from occupying the premises, and living in the dwelling house, by the defendant. The complaint set forth also that since the said partition the defendant had had the management and control of the property, and enjoyed the receipts, and rents, issues and profits of the same; that the defendant was a man of idle habits and addicted to the use of spirituous liquors, to such a degree as to become frequently intoxicated; that he had been careless and improvident in the management and cultivation of the said farm and had greatly neglected the same; and that since the passage by the legislature of this state of the law for the more effectual protection of the property of married women the defendant had avowed to the plaintiff his determination to exercise the exclusive control and direction of the said farm, and had prevented the plaintiff from having any power or control over the same; stating attempts by her to use and control the property, and the prevention thereof by the defendant, and finally the entire expulsion of her from the house and premises, and this by personal force and violence, and the refusal of the defendant to permit her to return, and live in the house, or upon the premises, and an entire omission and refusal of the defendant to provide for her or her family, and an increase of the intemperate habits of the defendant; concluding with a prayer for the relief above stated. To this complaint the defendant interposed a demurrer, alleging as the grounds of demurrer, 1. That the court had no jurisdiction of the action, and no power to grant the relief; 2. That the complaint did not state facts sufficient to constitute a cause of action, inasmuch as it appeared from the complaint, that the rights of the defendant to the property in question were vested rights, and claiming that the act of April 7th, 1848, enacted for the protection of the property of married women, could not apply to the case.

R. Cooper, for the plaintiff.

Starkweather & Field, for the defendant.

White v. White.

MASON, J. The second section of the act of April 7th, 1848, under which the plaintiff claims the possession of the property in this case and that the defendant be restrained from interfering with the same, &c. is as follows: "The real and personal property, and the rents, issues and profits thereof, of any female now married, shall not be subject to the disposal of her husband, but shall be her sole and separate property, as if she were a single female, except so far as the same may be liable for the debts of her husband heretofore contracted." (*Laws of 1848, p. 307.*) It is a general rule that courts incline against such a construction of a statute as would give it a retrospective action, so as to take away a vested right. (7 *John. Rep.* 477.) But when the intention of the legislature is apparent, it is the duty of the courts to see that the statute has its full effect, and is not eluded by construction. (15 *Id.* 358.) I do not for a moment doubt that it was the intention of the legislature, by this statute, to give to the wife control over her real estate, and to sever the husband's rights to possess it. This, it seems to me, is most manifest from the plain reading of the statute itself. The husband, by the marriage, does not become absolute proprietor of the wife's inheritance, but, as governor of the family, is so far master of it as to receive the profits of it during her life, but has no power to make an absolute sale of it without her consent. (2 *Bacon's Abr. Bouv. ed. tit. Baron & Feme, C. p. 15.*) This is an estate growing out of the marital relations, and is wholly dependant upon them. In the language of the common law, the husband becomes a tenant by the curtesy; the title in fee remaining in the wife. This is one of the legal effects which the common law attaches to the marriage. The wife's legal existence and authority is in a degree lost or suspended, and the husband succeeds to the possession of her lands, and takes the rents and profits *jure uxoris*, and if the wife dies before the husband, without having issue of the marriage born alive, her heirs succeed to the estate. If, however, there has been a child of the marriage born alive, the husband takes the estate absolutely for life as tenant by the curtesy. (2 *Ken's Com. 3d ed.* 130, 131,)

White v. White.

The only difficulty which I have encountered in this case, in giving the plaintiff the relief sought by the complaint, arises from the doubts which have arisen in my mind as to the validity of the statute under consideration. There have been three considerations urged against the validity of this statute, and which we cannot avoid considering in this case, however grave or delicate the questions may be. And it would be but arrogance in me did I not feel and confess my embarrassment in the determination of questions of so grave magnitude. The determination of the questions raised by the demurrer in this case is a duty, however, from which we cannot be excused, however unpleasant the performance of it may be. The validity of this act of the legislature must be faithfully examined and impartially determined. The first objection raised against the validity of this statute is that the legislature of this state has transcended its authority as a state legislature. In short, that the 2d section of the statute under consideration is in conflict with the constitution of the United States, and consequently void. That it is a statute repugnant to that provision of the constitution of the United States which prohibits a state from passing any law impairing the obligation of contracts. The argument is that the relation of husband and wife is created by a contract of the parties, and is to be regarded as a mere civil contract between the parties. That by virtue of the contract of marriage between the parties in this case the husband succeeded to all the plaintiff's personal property and to the rents and profits of her real estate, during coverture at least, and that the statute under consideration takes away from the defendant in this suit those vested rights of property, and thereby assails and impairs the obligations of the marriage contract. This question has never arisen in the courts of this state, and I am not aware of any adjudication of the question in any of the other states of the Union. I have looked carefully, also, into the reports of the adjudications of the United States courts, and do not find any determination of the question by those tribunals. I am aware that in the case of *Dartmouth College v. Woodward*, (4 U. S. Cond. Rep. 576, 7,) the late lamented Jus-

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White v. White.

tice Story intimates the opinion that the contract of marriage is a contract, within this prohibition of the constitution of the United States. To use his own language in that case, "If under the faith of existing laws a contract of marriage be duly solemnized, or a marriage settlement be made, (and a marriage is always in law a valuable consideration for a contract,) it is not easy to perceive why a dissolution of its obligations without any default or assent of the parties may not as well fall within this prohibition as any other contract for a valuable consideration." Again he says, "A man has just as good a right to his wife as to the property acquired under a marriage contract. He has a legal right to her society and her fortune, and to divest such right without his default and against his will, would be as flagrant a violation of the principles of justice as the confiscation of his own estate." He concludes, however, by saying, "I leave this case however to be settled when it shall arise." (4 *U. S. Cond. Rep.* 577.) This language is *obiter*, and has not therefore the weight of authority, however we might respect it as the opinion of a learned judge. I have bestowed the most deliberate consideration upon this branch of the case, and have come to a conclusion adverse to that intimated by the learned judge in the case above cited. At the time of the adoption of the constitution of the United States the power of the state legislatures to control and modify the marriage relation, with all its incidents, was unquestioned, and the subject was considered peculiarly within the province of state legislation. And I cannot think that it was against any abuses of the exercise of this right by the state legislatures that this constitutional provision was framed; and that it would therefore be a violent presumption to suppose that it was the intention of the framers of the national constitution to divest the states of their right to legislate upon this subject. And I apprehend that this is the first attempt that has seriously been made to bring the relation of husband and wife within the prohibition of this clause of the constitution respecting contracts; while it cannot be denied, on the other hand, that all the obligations growing out of this relation have, in repeated instances, been wholly annulled by

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White v. White.

special laws passed by the legislatures of the different states granting divorces to the parties. In many of the states of the Union there is no judicial remedy by one party against the other for a breach of the obligation of the marriage relation; the only remedy being by divorce, which is granted by the legislature alone. And I am not aware that the legislative power of a state, thus wholly to annul the marriage relation, has ever been seriously questioned. It is a power that has been exercised by most if not all of the states of the Union, and it was adjudged in the case of *Starr v. Pease*, (8 Cowen, 541,) that a legislative divorce *a vinculo*, for cause, such as a breach of the marriage obligations, was a constitutional and valid act; and such is the opinion of Chancellor Kent in his Commentaries. (2 *Kent's Com.* 107, 3d ed.) And the opinion of Chief Justice Marshall in the case of *Dartmouth College v. Woodward* is to the effect that a general law regulating divorces for cause is within the province of state legislation; and such indeed is the opinion of Justice Story. He says in that case, that a general law regulating divorces is not necessarily a law impairing the obligation of such a contract. And he is of opinion that a law punishing a breach of a contract, by imposing a forfeiture of the rights acquired under it, or dissolving it because the mutual obligations were no longer observed, was not a law impairing the obligation of contracts; while at the same time he most emphatically declared that he was not prepared to admit a power in the state legislatures to dissolve a marriage contract at pleasure, without any cause or default, and against the wishes of a party, and without a judicial inquiry to ascertain the breach of the contract.

It cannot be denied that, while the marriage relation is said to be a civil contract between the parties, it is not a contract in the full common law sense of the term. It is from the Romans, from whom we have derived the civil law, that the idea has come that marriage was a civil contract. It was however with them a contract without much of an obligation; as the continuance of the relation depended almost wholly upon the caprice of one or the other of the parties. (2 *Kent's Com.* 85, 2d ed.

White v. White.

Notes to Cooper's Justinian, 437, 438.) Marriage is a civil institution, established for great public objects. It is defined to be a compact between a man and woman for the procreation and education of children. (6 *Bac. Abr. Bouv. ed. tit. Baron and Feme*, A. *Id. tit. Marriage and Divorce*, A.) And it has a similar definition to this in the civil law. (*Cooper's Justinian*, 419.) It is wanting, however, in many of the essential ingredients of a contract, and is regulated more upon grounds of public policy to accomplish the great objects of such a relation, than it is with reference to the pecuniary rights of the parties as it regards each other. Unlike other contracts at the common law, the parties may enter into it, the male at the age of fourteen and the female at the age of twelve years. It cannot, like ordinary contracts, be dissolved by mutual agreement, or cancelled upon a valuable consideration paid. Neither can its obligations be modified by the parties. The will of society, and public policy, supersede the will of the parties. And however unable one of the parties may subsequently become to perform the obligations resulting from the relation, the other is still bound. Not even a total overthrow of all the mental powers, terminating in fixed and permanent insanity, is permitted to operate as a discharge of the other party from its obligations. And the very creation of this relation, with a qualified exception, dissolves all previous contracts between the parties, and produces a total incapacity to enter into any other. In fact, about the only essential features of a contract it possesses is that the assent of the parties is necessary to create the relation; and it cannot be alleged that the mere consent of the parties to establish a certain relation in society between them necessarily makes the transaction a contract. If this were so, the relation of guardian and ward, whenever the ward chooses the guardian, would be the result of a contract, and consequently beyond the control of state legislation. Without further consideration of this branch of the case, I will conclude by saying that in my opinion the marriage relation is not created by what we understand to be a contract in the strict common law sense of that term; and indeed is not what in popular language and com-

White v. White.

mon parlance we understand by the term contract; and that it is not therefore a contract within the spirit and meaning of this prohibitory clause of the constitution of the United States. It follows, therefore, that there is nothing in the constitution of the United States which invalidates the statute under consideration; for there is nothing in that instrument which prohibits a state legislature from taking away vested rights, unless they arise out of a contract. This was expressly adjudged in the case of *Watson v. Mercer*, (8 *Peters*, 88.)

The next question which I propose to consider in this case is, does the statute under consideration violate the first section of article one of the constitution of this state, which is as follows: "No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." The defendant in this suit, by virtue of the marriage contract with the plaintiff, became seised of a freehold estate in this farm. He not only succeeded to rights of property, but he became actually seised of the freehold *jure uxoris*, and entitled to take the rents and profits during their joint lives in any event; and as there were children born alive of the marriage, he took an absolute freehold estate for life as tenant by the curtesy. (2 *Kent's Com.* 130, 1, 2d ed. *Adair v. Scott*, 3 *Hill*, 182.) This section one of article one of the present constitution is but a copy of section one of article seven of the former constitution of the state, and has received judicial construction. The question arose in the case of *Taylor v. Porter & Ford*, (4 *Hill*, 140,) as to the validity of a general statute of the state authorizing private roads to be laid out over the lands of others, for the use of the *applicant, his heirs and assigns*. And the act of the legislature was adjudged to be unconstitutional, as coming in conflict with this section of the constitution. We must therefore regard this section of the constitution as having received judicial construction. "No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." The court, in the case of *Tay-*

 White v. White.

lor v. Porter and Ford, in considering the expression "*by the law of the land*," contained in this section, use the following language: "The words 'by the law of the land,' as here used, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses, you shall be vested with the legislative power of the state, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen unless you pass a statute for that purpose; in other words, you shall not do wrong unless you choose to do it." Again, says the court in that case, "The meaning of the section then seems to be, that no member of this state shall be disfranchised, or deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, or that some one else *has a superior title to the property* he possesses, before either of them can be taken from him. It cannot be done by mere legislation." The same principle was adjudged at an earlier day, in the *Matter of Albany-street*, (11 *Wend.* 149.) This principle is again recognized in the case of *Bloodgood v. Mohawk and Hudson Rail-Road Company*, (18 *Wend.* 9.)

— But again, it seems to me that this act of the legislature must be adjudged void as controverting the sixth section of article one of the constitution of this state, which declares that "No person shall be subject to be twice put in jeopardy for the same offence; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of *life, liberty or property*, without due process of law. Nor shall private property be taken for public use, without just compensation." (*Art. 1, sec. 6, Const.*) This is an exact copy of a part of the 7th section of article 7 of the former constitution of this state, and the expression "*nor be deprived of life, liberty or property, without due process of law*," received judicial construction in the case of *Taylor v. Porter and Ford, supra*; and the court, in com-

White v. White.

menting upon this part of the section, say: "The words '*due process of law*,' in this place, cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property. It will be seen that the same measure of protection against legislative encroachment is extended to life, liberty and property; and if the latter can be taken without a forensic trial and judgment, there is no security for the others. If the legislature can take the property of A. and transfer it to B., they can take A. himself and either shut him up in prison or put him to death. But none of these things can be done by mere legislation. There must be due process of law." These same provisions of the present constitution were again considered by this court in the case of *Gilbert v. Foote*, in which case the court declared the statute entitled "*of proceedings for the draining of swamps, marshes, and other low lands*," (2 R. S. 548,) unconstitutional. The case went to the court of appeals, and was affirmed by default, in that court, at the last January term thereof. This court deciding that as the statute authorized the taking of the property of the owner of the land, and transferring it to the applicant for the ditch, his heirs and assigns, against the consent of the owner, it was in conflict with these provisions of the constitution above referred to, and consequently void. This case has not yet been reported. The decision of the case of *Bloodgood v. The Mohawk & Hudson R. R. Co.* (18 Wend. 59,) was made in 1837; and the case of *Taylor v. Porter and Ford*, (4 Hill, 140,) was decided in 1843. In the latter case this general statute of the state was declared to be an infraction of these provisions of the constitution, and the principle decided in these cases was well understood by the framers of the present constitution; and they must have appreciated the full force of the decision in the latter case, as they have provided by section seven of article one of the present constitution, that so far as private roads are concerned they may be opened in the manner to be prescribed by law, but have not extended the right to take private property for private use, beyond the case of opening private roads; and from the very fact

White v. White.

that they have not, I think the inference is irresistible that they did not intend it should be.

But again ; I am not prepared to admit that the legislature of a state possesses any such power as would authorize them to take the property of one person and give it to another, against the consent of the owner, were there no such prohibitions contained in the constitution. It has been said that the British parliament is omnipotent ; but the great commentator upon the laws of England seems to think that when they speak of the omnipotence of parliament they use a figure of speech rather too bold. (1 *Black. Com.* 161.) But the omnipotence of parliament signifies nothing more than the supreme sovereign power of the state ; and I think therefore that De Lolme made an unwarrantable assertion, when he said that "it is a fundamental principle with the English lawyers, that parliament can do every thing but make a woman a man and a man a woman." The legislature, however, is not supreme under our form of government. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. (4 *Hill*, 144.) It was said by the late Justice Story, in the case of *Wilkerson v. Leland*, (2 *Peters*, 657,) "That a government can scarcely be deemed to be free when the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred." Again, he says, "We know of no case in which a legislative act to transfer the property of A. to B. without his consent has ever been held a constitutional exercise of legislative power, in any state in the union. On the contrary, it has constantly been resisted as inconsistent with first principles, by every judicial tribunal in which it has been attempted to be enforced." I maintain, therefore, that the security of the citizen against such arbitrary legislation rests upon the broader and more solid ground of natural rights, and is not wholly dependent upon these negatives upon the legislative power contained in the constitution. It can never be admitted as a just attribute of sovereignty in a

White v. White.

government, to take the property of one citizen and bestow it upon another. The exercise of such a power is incompatible with the nature and object of all government, and is destructive of the great end and aim for which government is instituted, and is subversive of the fundamental principles upon which all free governments are organized. This was a power repudiated by the Romans during the whole reign of imperial despotism, and has ever been a maxim of the civil law. And the right of the subject against the exercise of such arbitrary power was asserted in England as one of the sovereign rights of the citizen, and forms a part of the 29th chapter of magna charta. I do not hesitate, in conclusion, to declare that the people of the state of New-York have never delegated to their legislature the power to divest the vested rights of property legally acquired by any citizen of the state, and transfer them to another, against the will of the owner. The legislature of this state can only lawfully exercise such powers as have been confided to it by the sovereign will of the people; and when it usurps powers not intrusted to it by the sovereign power, its acts are as utterly void as those of the most inferior magistrate in the land, in a case where he has transcended his jurisdiction. It follows, therefore, that this act of the legislature under which the plaintiff has sought the relief claimed in this case, is void, and consequently can confer no rights upon her.(a) / I have not, in declaring the deliberate judgment which I entertain in this case, been unmindful of the importance and delicacy of the duties devolving upon this court. We are called upon to declare an important statute of the state unconstitutional and void; a statute deeply affecting the most important and delicate of the marital rights; a statute, it is said, passed to repeal the common law and substitute the civil in its stead; a law called for, it is alleged, by the popular voice of the state, and demanded by the onward progress of society. In a case like this, the court can never find a motive to transcend its duty, and I trust it will always be found to possess independence enough to do that. The defendant must have judgment upon the demurrer.

(a) See *Holmes v. Holmes*, (4 Barb. Sup. Court Rep. 295,) S. P.

WASHINGTON SPECIAL TERM, February, 1849.

Paige, Justice.

SPEAR vs. CUTTER.

A court of equity will interfere to prevent injury to land, even where the title is in dispute, and the right is doubtful, if the waste or trespass will be attended by irreparable mischief, or if, from the irresponsibility of the defendant, or otherwise, the plaintiff cannot obtain relief at law.

A court of equity will not sustain an injunction bill, filed merely to prevent the removal of timber wrongfully cut, or for an account for waste already committed; as the plaintiff has an ample remedy at law, for such injury.

But where the bill is filed to prevent future waste, and also to prevent the removal of timber already cut, or for an account for waste already committed, the court, to avoid multiplicity of suits, will allow an account and satisfaction for what has been done; and where the mischief to the plaintiff will be irreparable, will also enjoin the defendant from removing the timber he has cut.

IN EQUITY. Demurrer to bill of complaint; and motion to dissolve injunction founded on the bill alone. The plaintiff alleged in his bill that he was the owner of lot No. 20 in Legg's patent; that he and those under whom he claimed were in possession, claiming title, and had been from 1833 to April 28, 1845; that for four years previous to this latter date, L. Bates occupied the lot as his tenant; that D. Russell, on the 11th of Nov. 1844, instituted summary proceedings under the provisions of the revised statutes in relation to landlords and tenants, before a county judge of Essex county, to recover possession of the lot, and succeeded in dispossessing Bates; that the plaintiff defended the suit. And the plaintiff further alleged that he had sued out a certiorari for the reversal of such proceedings; but that no argument or decision of the suit in the supreme court had been had. And he further stated, in his bill, that he had been advised by his counsel, that the affidavit on which the summary proceedings were founded, was not sufficient to give the county judge jurisdiction. The plaintiff further stated that one-half of the lot was uncultivated, and that its chief value consisted in the timber standing and growing thereon; that the

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Spear v. Cutter.

defendant had committed waste by cutting down large quantities of such timber, which was then lying on said lot; and that unless he was restrained, he would continue to cut down such timber, whereby irreparable injury would be done to the premises; that the defendant was insolvent, &c. The plaintiff prayed for an injunction staying further waste, and restraining the defendant from removing or disposing of the timber already cut on the lot, &c.

I. W. Thompson, for the plaintiff.

C. L. Allen, for the defendant.

PAIGE, J. The defendant insists that as he is in possession, claiming adversely to the plaintiff, and as the title is in dispute, an injunction bill to stay waste cannot be sustained. *Storms v. Mann*, (4 *John. Ch.* 21,) is cited in support of this proposition. In that case, the defendant had been in possession of the premises a long time, and was in possession at the time of the filing of the bill; the plaintiff had commenced an ejectment at law, and the defendant had joined issue with him on the question of title, and the action was pending, undetermined. But in the bill in that case, there was no allegation of the insolvency of the defendant, or that the waste which he was committing would be an irreparable injury to the premises. In this case, as appears from the bill, which is conceded by the demurrer to be true, the plaintiff is the owner of the premises in question, and as such owner was in the quiet possession thereof from 1833 to the 11th of November, 1844, when D. Russell commenced summary proceedings for the recovery of the possession; and the defendant is committing waste by cutting down the standing timber, which will be an irreparable injury to the land; and no remuneration for such injury can ever be recovered from the defendant, as he is wholly insolvent. Unless, therefore, the injunction is sustained, the plaintiff, in the event of his being restored to the possession by a writ of restitution, will be entirely remediless. If it was necessary at

Spear v. Cutter.

this time to pass upon the affidavit on which the summary proceedings were founded, I should have little hesitation in pronouncing it insufficient to give the county judge jurisdiction. It fails to show that the relation of landlord and tenant existed between Russell and Bates; or even that Bates entered into possession under and by virtue of Russell's title. If the county judge did not acquire jurisdiction, the proceedings before him were entirely void; and the plaintiff's tenant was illegally and improperly dispossessed. But, for the purpose of disposing of the demurrer, and the motion to dissolve the injunction, I do not think it necessary to decide the question as to the sufficiency of the affidavit on which the summary proceedings were founded.

Courts of equity originally declined to interfere by restraining waste or trespass where the right was doubtful, or the defendant was in possession claiming by an adverse title. (4 *John. Ch.* 22. *Story's Eq. Jurisp.* § 918.) But such courts have gradually enlarged their jurisdiction in such cases, and now they interfere to prevent injury to land, even where the title is in dispute and the right is doubtful, if the waste or trespass will be attended by irreparable mischief, or if, from the irresponsibility of the defendant, or otherwise, the plaintiff cannot obtain relief at law. (*Id.* §§ 910, 918, 928, and note 2. *Hart v. Mayor, &c. of Albany*, 3 *Paige*, 214. *Winship v. Pitts*, *Id.* 261. *New-York Printing and Dying Estab. v. Fitch*, 1 *Id.* 99. *Mitf.* 137. *Hawley v. Clowes*, 2 *John. Ch.* 121. *Hanson v. Gardner*, 7 *Ves.* 310, 311. *Thomas v. Oakley*, 18 *Id.* 184. *Livingston v. Livingston*, 6 *John. Ch.* 497. *Field v. Beaumont*, 1 *Swanst.* 208.) The commission of waste, of every kind—such as the cutting of timber, pulling down houses, working of mines, &c. is now a very frequent ground for the exercise of the jurisdiction of courts of equity, by restraining the waste until the rights of the parties are determined. (*Mitf. Pl.* 137. *Livingston v. Livingston*, 6 *John. Ch.* 499, 500, and cases cited by *Chancellor Kent.*) The interference by injunction, in these cases, is placed upon the ground of preventing irreparable mischief, and the destruction of the substance

Spear v. Cutter.

of the inheritance. In *Livingston v. Livingston*, (6 *John. Ch.* 497,) Chancellor Kent held that injunctions will be granted to prevent trespass, as well as to stay waste, where the mischief will be irreparable, and to prevent a multiplicity of suits. A court of equity will not sustain an injunction bill, filed merely to prevent the removal of timber wrongfully cut, or for an account for waste already committed; as the plaintiff has an ample remedy for such injury, at law. But where the bill is filed to prevent future waste, and also to prevent the removal of timber already cut, or for an account for waste already committed, the court, to avoid multiplicity of suits, will allow an account and satisfaction for what has been done, and where the mischief to the plaintiff will be irreparable, will also enjoin the defendant from removing the timber already cut. (*Watson v. Hunter*, 5 *John. Ch.* 168.) In this case, as the defendant is insolvent, the injury to the plaintiff will be irreparable if the defendant is permitted to remove or dispose of the timber he has already cut on the premises in question.

The plaintiff has no remedy under the revised statutes, (2 *R. S.* 336, § 18,) by an application to the supreme court for an order restraining the defendant from the commission of waste. He has commenced no action for the recovery of the premises in question, to bring himself within the 18th section of the title relative to waste. (2 *Id.* 336.)

The motion to dissolve the injunction must be denied; and the defendant's demurrer must be overruled, with leave to answer the bill in 40 days after notice of the order overruling the demurrer, on payment of costs.

ERIE GENERAL TERM, March, 1849. *Floyd, Mullett, and Marvin, Justices.*

DOLE vs. GOLD.

The sufficiency of a notice to an endorser of a note, when there is no dispute about the facts, is a question of law, to be determined by the court.

A notice to an endorser must, in express terms, or by necessary implication, convey to him information of the fact that the note has been dishonored by the maker; or such notice will be insufficient to charge him.

A maker of a negotiable promissory note, payable at large, does not, in this sense, dishonor his note until, upon due presentment for that purpose, he refuses or neglects to pay it.

ERROR to the recorder's court of the city of Buffalo, to review a judgment of that court affirming a judgment of a justice's court. The action before the justice was for the recovery of the money due on a promissory note made by Andrew Cole, payable to the order of Benjamin Dole, and endorsed by him. Dole being served with process, appeared before the justice and pleaded the general issue. On the trial before the justice the plaintiff produced the note, proved the making and endorsing thereof, a demand of payment of the maker in due time, his refusal to pay, and that on the same day of the demand he caused a written notice to be served on Dole, the endorser, in the words following:

"BUFFALO, Sept. 8th, 1847.

Dear Sir—A note of \$22,50, made by Andrew Cole and payable to your order, and endorsed by you, is due this day, and has not been paid. You will therefore take notice that I am the owner and holder of said note, and look to you for the payment of the same. Yours, &c. C. R. GOLD."

And thereupon the plaintiff rested his case. The defendant, Dole, moved for a nonsuit, on the ground that the notice was not sufficient to charge him as endorser; that it was defective in not stating that payment of the note had been demanded of the maker.

Dole v. Gold.

The justice refused the nonsuit, and gave judgment for the plaintiff, against Dole, for the amount of the note, interest and costs. The judgment was taken to the recorder's court, by certiorari, and there affirmed. The judgment of the recorder's court was brought here by writ of error. The only question made on the argument in this court, or presented by the case, related to the sufficiency of the notice to the plaintiff in error, to charge him as endorser of the note made by Cole.

W. H. Greene, for the plaintiff in error.

C. H. S. Williams, for the defendant in error.

By the Court, MULLETT, J. The conditional nature of the endorser's contract is not denied in this case, nor is it denied that to make the endorser liable, the holder of the note must prove on the trial, that the payment of the note was properly demanded of the maker, and refused or neglected by him; or, in other words, that the note was dishonored by the maker, and that the requisite notice was given to the endorser. The demand and non-payment were sufficiently proved before the justice, and the only question for our consideration relates to the sufficiency of the notice to the endorser. The notice was a written notice subscribed by Gold, the holder of the note, addressed to the endorser, dated and served the day the note became due, and stated that the note, describing it, was *due that day and had not been paid*, and that the subscriber was the owner and holder of the note, and looked to the endorser for the payment of the same. This presents the question whether it was necessary that the notice should inform the endorser that payment of the note had been demanded of the maker. In this state, the sufficiency of the notice, when there is no dispute about the facts, is a question of law, to be determined by the court. (*Vanhoesen v. Alstyme*, 3 Wend. 75. *The Bank of Utica v. Bender*, 21 Id. 643. *Remer v. Downer*, 23 Id. 620. *Ransom v. Muck*, 2 Hill, 587. *Spencer v. Bank of Salina*, 3 Id. 520.)

Dole v. Gold.

29 These decisions are in accordance with the English doctrine on the subject, as it was asserted by Buller, Justice, in the case of *Tindal v. Brown*, decided in 1786, (1 *T. R.* 169,) and generally maintained by the king's bench ever since. For the more recent English decisions on this subject, see the chancellor's references in the case of *Remer v. Downer*, above cited. The same principle is adopted in several of the states. In Massachusetts, in the cases of *Gilbert v. Dennis*, (3 *Met.* 495,) *Pinkham v. Macy*, (9 *Id.* 374.) In Pennsylvania, in the case of *Brenzer v. Wightman*, (7 *Watts & Serg.* 264.) In Michigan, in the case of *Platt v. Drake*, (1 *Doug. Mich. Rep.* 296,) and by the supreme court of the United States, in the cases of *The Bank of Columbia v. Lawrence*, (1 *Peters' Rep.* 578, *Thompson*, J. 582;) *Rhet v. Poe*, (2 *Howard's U. S. Rep.* 457, *Daniel*, J. 480, 481;) *Harris v. Robinson*, (4 *Id.* 336, *Woodbury*, J. 344, 345.)

\ This being the settled law, the question of the sufficiency of the notice cannot be avoided by the court, under any pretence of submitting it to a jury, to say whether the party could understand what was meant, or whether he was misled by it or not. It is true, there may be many facts connected with the question of proper diligence in giving notice—such as the residence of the parties, the course of communication between them, &c.—which must be submitted to a jury; but the notice, however and whenever sent, must speak for itself. In a case like the one under consideration, there are no extrinsic facts for the jury to find. The notice was properly sent, and shows upon its face what information it gave the endorser, and the court must decide whether it is sufficient or not. The necessity of giving notice to the endorser, grows out of the legal construction of the obligation which he assumes by endorsing the note. Mr. Justice Story, in his *Treatise on Promissory Notes*, section 135, says: "The endorsement of a note, in contemplation of law, amounts to a contract on the part of the endorser, with and in favor of the endorsee, and every subsequent holder to whom the note is transferred, *first*, that the instrument itself and the antecedent signatures thereon are genuine; *second*,

Dole v. Gold.

that he, the endorser, has a good title to the instrument; *third*, that he is competent to bind himself by the endorsement, as endorser; *fourth*, that the maker is competent to bind himself to the payment, and will, upon due presentment of the note, pay it at maturity; *fifth*, that if, when duly presented, it is not paid by the maker, he, the endorser, will, *upon due and reasonable notice given to him of the dishonor*, pay the same to the endorsee or holder. The terms of this contract impose upon the endorsee or holder an obligation to make an attempt to obtain payment from the maker, and to give notice of such attempt, and its failure, to the endorser; and the performance of this obligation is a condition precedent to the right of the holder to resort to the endorser for the payment of the note. Until the performance of this obligation on the part of the holder, the endorser's liability is *contingent*—upon the performance, it becomes *absolute*. One part of this condition precedent, to be performed by the holder, is the giving of the notice to the endorser. What must this notice contain? The requisites of the notice, that is, what information it must give to the endorser, must be prescribed by law, though the law requires no particular form of words in which that information must be conveyed." (*Story on Bills of Exchange*, § 390. *Story on Promissory Notes*, § 348.)

In his Commentaries on the Law of Promissory Notes, section 348, Mr. Justice Story says: "It is indispensable that the notice should either expressly or by just and natural implication, contain in substance the following requisites: 1st. A true description of the note, so as to ascertain its identity. 2d. *An assertion that it has been duly presented to the maker at its maturity, and dishonored.* 3d. That the holder or other person giving the notice, looks to the person to whom the notice is given, for payment and indemnity."

The second requisite is the only one in question in this case. The counsel for the defendant in error insists, that it is not necessary in the notice to the endorser, to inform him that payment of the note had been demanded of the maker, and he relies principally upon the case of *Mills v. The Bank of the United*

Dole v. Gold.

States, (11 *Wheat. Rep.* 431,) to sustain that proposition. It is true, that some of the language of the learned judge, who delivered the opinion of the court in the case of *Mills v. The Bank of the United States*, disconnected from the subject matter of the case, would seem to favor the assumption of the defendant in error; but applied to the case then under consideration, the opinion merely decides that a notice to an endorser of a note, describing it as payable at a particular bank, on a certain day, and endorsed by him, had been *protested for non-payment*, was not fatally defective by reason of its not stating that payment was demanded at the bank when the note became due. (See *Ch. J. Shaw's review of the opinion in the case of Mills v. The Bank of the United States*, 3 *Met. Rep.* 495.)

But whatever may be considered as decided in the case of *Mills v. The Bank of the United States*, the opinion of the court was delivered by Mr. Justice Story, in February, 1826, and before the particular requisites of a notice to an endorser had been a subject of much judicial discussion. About this time the particular point now under consideration became a subject of extensive litigation in the English courts, which occupied their attention for several years. In 1825, it was decided by the king's bench, in *Hartly v. Case*, Abbott, Ch. J. delivering the opinion, that a notice from the holder of a bill of exchange to the endorser, in the following form: "I am desired to apply to you for the payment of the sum of £150, due to myself on a draft drawn by Mr. S. on Mr. Case, which I hope you will, on receipt, discharge, to prevent the necessity of law proceedings, which otherwise will immediately take place," was insufficient to charge the endorser, because it did not apprize the party of the fact of dishonor. The Ch. J. says that no particular form of words is necessary in such a notice, but the *language used* must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor. (4 *Barn. & Cress.* 339; *S. C. Dowl. & Ryl.* 505. 10 *Eng. Com. Law Rep.* 350.) About the same time the great case of *Solarte v. Palmer*, originated in the common pleas. Lord Tenterden, at nisi prius, had instructed the jury that a letter

Dole v. Gold.

from the attorney of the holders, addressed to the endorsers of a bill of exchange, in the following words: "Gentlemen—A bill for £683, drawn by Mr. Joseph Keats upon Messrs. Daniel, Jones & Co., and bearing your endorsement, has been put into our hands by the holders, (naming them,) with directions to take legal measures for the recovery thereof, unless immediately paid to yours, &c." was insufficient to charge the endorser, to which direction the plaintiff excepted. The bill of exceptions stated that the chief justice did then and there declare and deliver his opinion to the jury, that the letter was not a sufficient notice of the dishonor and non-payment of the bill of exchange to entitle the plaintiffs to maintain their action against the defendants, and that the jury thereupon gave a verdict for the defendants. The court, upon the bill of exceptions, having overruled the decision of the chief justice, and given judgment for the plaintiff, this judgment was taken into the court of exchequer chamber by writ of error; and in A. D. 1831, was reversed by the unanimous concurrence of all the members of the court. The leading opinion on the reversal was delivered by Tindal, Ch. J. who sustained the *nisi prius* decision of Lord Tenterden, and, in his opinion, says: "The notice should at least inform the party to whom it is addressed, either in express terms or by necessary implication, that the bill has been dishonored. In this notice we think no such information is conveyed in terms, or is to be necessarily implied from its contents. It is perfectly consistent with this notice, that the bill has never been presented at all." (7 Bing. 350. 20 Eng. Com. Law Rep. 226.) This case was appealed to the house of lords, and decided there in 1834, upon which the judgment of the court of exchequer chamber was affirmed. Park, J. delivering the leading opinion, says: "The letter of the plaintiff's attorneys did not amount to a notice of the dishonor of the bill; as such notice ought in express terms, or by necessary implication, to convey full information that the bill had been dishonored." Lord Brougham, C. concurred in the opinion, on the authority of *Hartly v. Case*, the unanimous decision of the exchequer chamber, and the 5th edition of Bayley on Bills, and

Dole v. Gold.

remarked, "that the case was too clear for an appeal." The decision of the house of lords was concurred in by all the judges present, who had been summoned to hear the argument, to wit: Williams, J., Bolland, B., Alderson, B., Patteson, J., Taunton, J., Littledale, J., Vaughn, J., and Gaselee, J. (1 *Bing. N. C.* 194. 27 *Eng. Com. Law Rep.* 351.)

The next case in point of time is that of *Boulton v. Welch*, decided in the common pleas, in 1837. Park, J. at nisi prius, had decided that a notice from the holder to the endorser of a promissory note, describing the note by its amount, the maker's name, its date and the time of its payment, and stating that it was endorsed by him, and that "it became due yesterday, and was returned to him (the holder) unpaid," and requesting payment forthwith, was not sufficient. A verdict, however, was taken for the plaintiff, with leave to the defendant to move for a nonsuit. On the hearing of the rule nisi for a nonsuit, Tindal, Ch. J. said: "It did not appear from the letter, (notice,) by necessary inference, that the note had been dishonored. The rule requires that either expressly or by necessary inference, the notice should disclose that the bill or note had been dishonored; here the notice only states that the note had become due and had been returned unpaid. I think, therefore, that the notice is insufficient, and that this rule must be made absolute." Park, Bosanquet, and Coltman, justices, expressly concurred, on the authority of *Hartly v. Case*, and *Solarte v. Palmer*, (3 *Bing. N. C.* 683; 32 *Eng. Com. Law Rep.* 283.) In the case of *Phillips v. Gould*, Patteson, J. at the sittings in London, in 1838, ruled that notice from the holder to the endorser of a bill of exchange, stating that a bill of exchange (describing it) "lies at my office due and unpaid," was not a good notice of the dishonor of the bill, and referred to the case of *Solarte v. Palmer*, as decided by the house of lords, (8 *Car. & Payne*, 335. 34 *Eng. Com. Law Rep.* 425.)

In the case of *Strange v. Price*, decided in the common pleas, in 1839, that court, on the authority of *Hartly v. Case* and *Solarte v. Palmer*, decided that a notice in substance as follows: "Messrs. S. & Co. inform Mr. P. that Mr. B.'s acceptance,

Dole v. Gold.

£57 5s. 5d., is not paid. As endorser Mr. P. is called upon to pay the money, which will be expected immediately," was insufficient. Denman, C. J., Littledale, Patteson, and Coleridge, Justices, concurring. (10 *Ad. & Ellis*, 125; 37 *Eng. Com. Law Rep.* 71.)

In the case of *Messenger v. Southey*, decided in the common pleas, in 1840, the question of the requisites of a notice to an endorser of a bill of exchange again came before the court for consideration. The notice was in this form: "Sir; This is to inform you that the bill I took of you, £15 2s. 6d., is not took up, and 4s. 6d. expenses, and the money I must have immediately. My son will be in London on Friday morning"—was, within the previous decisions, insufficient. Tindale, J. delivering the opinion of the court. (1 *Man. & Gran. Rep.* 76; 39 *Eng. Com. Law Rep.* 360.)

The last English case to which I am able to refer, is that of *Furze v. Sharwood*, decided in the king's bench, in 1841, in which, after a review of all the previous cases, it was determined in substance that a notice of the dishonor of a bill, by whatever party given, is insufficient if it merely state that the bill has not been paid when due. (2 *Ad. & Ellis Rep. N. S.* 338; 42 *Eng. Com. Law Rep.* 726.) Thus, after a kind of judicial obstinacy on the part of some of the judges of the common pleas, for about sixteen years, it is finally settled by all the courts, with the express concurrence of the ablest judges of one of the most commercial nations on earth, that when there is no dispute about the facts, the sufficiency of notice to an endorser of a bill or note is a question of law, and that the notice must, by its language, directly or by reasonable implication, inform the endorser that the paper has been dishonored, or the court will declare it insufficient. The same principle was adopted by the supreme judicial court of Massachusetts, in 1842, in the case of *Gilbert v. Dennis*, (3 *Met. Rep.* 495,) and adhered to by the same court in 1845, in the case of *Pinkhum v. Macy*, (9 *Id.* 174.) In this last case, Shaw, C. J. reasserts the rule that the "notice must be such as to inform the endorser, either in terms or by reasonable implication, that the note is dishonored, that

Dole v. Gold.

is, that it has been presented for payment and payment refused, or other acts done which are deemed equivalent."

It appears by the digests that the same rule is adopted in several of the other states, but I have not time to refer to the decisions.

In 1845, after these repeated and almost annual adjudications of the English, and some of the highest American courts, for twenty years, the same learned jurist, who delivered the opinion in the case of *Mills v. The Bank of the United States*, in his Commentaries on Promissory Notes, not only states the "indispensable requisites" of the notice to an endorser, as above quoted from § 348, but in § 350, as to the statement in the notice, that the note has been duly presented and dishonored, says—"This statement is essential to establish the claim or right of the holder, or other party giving notice, for otherwise he will not be entitled to any payment from the endorser. It will be sufficient, indeed, if the notice sent, necessarily, or even fairly, implies by its *terms* that there has been a due presentment and dishonor at the maturity of the note, but mere notice of the fact that the note has not been paid, affords no proof whatever that it has been presented in due season, or even that it has been presented at all." And in § 354, the same learned author, after remarking that the rule adopted in the American courts upon the subject, is far more liberal than that generally maintained in the English courts, says—"If, however, there be no statement of the dishonor of the note, nor any thing from which it can fairly be implied that due presentment has been made, the notice would seem to be fatally defective." This rule requires only that the endorser should have notice of the dishonor of the note. Whatever will show the dishonor, is sufficient. Where a note is made payable at a bank, or other particular place, it is the business of the maker to have funds there at the time to take it up, and if he neglect to do so, he dishonors his note, and it is sufficient to inform the endorser of that fact. No personal demand of the maker is necessary. But the maker of a negotiable promissory note, payable at large, which may be transferred *ad infinitum*, without his knowledge, does

Dole v. Gold.

not dishonor his note until upon due presentment and demand he refuses or neglects to pay it. In such case, the holder must make a personal demand, or what is equivalent to a personal demand, of the maker, before he can claim, as against the endorser, that the note is dishonored. (*Taylor v. Snyder*, 3 *Denio*, 145. *Gilmore v. Spies*, 1 *Barb. S. C. Rep.* 158.) I confess I am unable to perceive upon what ground this rule can be called illiberal. It prescribes no particular form of notice, which business men must go to a law book to learn, and which must be adhered to, even at the expense of substance. It simply requires the holder, in such language as he may choose to adopt, to inform the endorser of the fact that the maker, on being called upon, has neglected to pay the note. That the contingency upon which the endorser's promise to pay the note depended, has happened, and that his liability has become absolute, or in other words, to do what he agreed to do, as the condition of having the endorser's security. This is a condition of the contract important to the endorser, whose rights are as worthy of protection as those of the holder, and I do not see upon what principle the courts can deprive him of its benefits. It is no answer to say that the holder cannot recover in an action against the endorser, without proving the dishonor of the paper by the party primarily liable. The endorser is not bound by his contract to incur the trouble, expense and business discredit of a lawsuit, to find out his liability. He contracted for a cheaper, fairer and more business-like mode of information, and he has a right to it, and by the rules of fair dealing he has a right to rely on it. And I have no doubt that if an endorser has been induced to pay the paper endorsed by him, by a false notice of its dishonor, he may recover back the money from the party who has thus fraudulently obtained it.

It was suggested on the argument that the rule contended for is too inflexible and unvarying for practical business purposes; that the activity of commercial pursuits could not safely be cramped by fixed rules on this subject. If it is necessary that this subject should be regulated by law, it is highly proper that that law, however liberal and expanded it may be, should be

Dole v. Gold.

fixed and invariable. That this subject should be governed by law, is a conclusion not only of reason but of experience. Commercial business dreads nothing so much as uncertainty; it can adapt itself to almost any fixed system, but cannot endure change and mutability in a system by which it is to be governed. Uncertainty destroys business confidence, and discourages enterprise. What man would deal in commercial paper, which in some form or other must in all commercial countries be to a great extent the medium of exchange and business, if the liability of the parties to it was from time to time, and again and again, to be left to the verdict of a jury, who, with the purest motives and highest intelligence, have, from their organization, no power to produce uniformity of decision. The necessity of fixed rules on the subject of notice to endorsers was strongly advocated by Lord Mansfield, and the evils of judicial hesitancy to declare such questions to be questions of law and not of fact, noticed by Buller, J. in the case of *Tindall v. Brown*, above referred to. In alluding to the course of English decisions on this subject at that time, the last mentioned honest and learned judge remarked that "The numerous cases on this subject reflect great discredit on the courts of Westminster. They do infinite mischief in the mercantile world, and this evil can only be remedied by doing what the court wished to do in the case of *Metcalf v. Hale*, by considering the reasonableness of time a question of law and not of fact." This evil, which would be as great now as it was then, has been remedied by the adoption of the rule proposed, and the measure has received the approbation of the business experience and the judicial wisdom of three generations, and I have no doubt that it ought to be sustained, for its conformity to the contract between the parties, for its own intrinsic reasonableness, and for its fitness to promote the safety and prosperity of commercial transactions. After having examined this question more with reference to the importance of the principle involved in it, than the amount in controversy between the parties, I have come to the conclusion that the sufficiency of the notice under consideration was a question of law; that the notice was clearly defective; that the

Burt v. Horner.

justice and the recorder's court erred in sustaining it ; and that for this reason the judgment of the recorder's court, and that of the justice, must be reversed.

Judgment reversed.

SAME TERM. *Mullett, Sill, and Marvin*, Justices.

BURT vs. HORNER and others.

The undertaking of the guarantor of a promissory note is not within the statute of frauds ; and if made upon a good consideration, is valid, although no consideration be expressed.

In an action upon a guaranty expressing no consideration, parol proof of the consideration is admissible, to supply the defect in the written instrument.

The legal effect of a guaranty in these words, endorsed on a promissory note, " We guaranty the collection of the within note," is the same as if it had been said, " We guaranty the collection of the within note *by due course of law*."

The obligation assumed by the holder, in accepting a note with such a guaranty endorsed upon it, is that in case the note is not paid at maturity, he will, within a reasonable time, and with due diligence, institute legal proceedings against the maker, for the collection of the note, and prosecute them to consummation, without delay.

This is a condition precedent to the liability of the guarantor, and imposes upon the guarantee the duty of diligence not only in the manner of conducting the prosecution, but also in the institution thereof.

Where there is no dispute about the situation and circumstances of the parties, and no question as to the steps which have been taken or omitted by the guarantee, against the principal debtor, the question of due diligence is a question of law.

An omission to sue the maker of a note, for seventeen months after its maturity, is such laches on the part of the holder as will discharge the guarantor.

And a neglect to sue the maker will not be excused by the fact that he has no property within this state. If he resides out of the state, at the time of giving the note, and continues to reside there, and has property at the place of his residence, it is the duty of the holder to prosecute him there, before he can have recourse to the guarantor.

THIS was a motion by the defendants to set aside the report of a referee. The defendants were parties doing business at

Burt v. Horner.

Williamsville in Erie county, and the plaintiff a merchant doing business in Buffalo. The defendants were the holders of a promissory note payable to them or bearer, one year after date, for \$358,61, made by Benjamin Troule, and dated "Bertie, Feb. 17, 1845." The note was not, by its terms, payable at any particular place. On the 19th of Sept. 1845, an agreement was made by the parties to this suit, by which the defendants were to purchase of the plaintiff merchandise to the amount of the note, and for the price the plaintiff was to take the note, with the defendants' guaranty of its collection. This agreement was carried into effect, the goods delivered to the defendants, and the note delivered to the plaintiff, with a memorandum in the following form written on the back and signed by the defendants: "Buffalo, Sept. 19, 1845. We guaranty the collection of the within note." Troule, at the time the note was made, was and has been ever since a resident of Bertie, Canada West, where the note was dated, about ten miles from Buffalo. After the note matured, and on the 5th of March, 1846, he paid on the note \$51, and on the 7th of March \$74. These sums were paid at the plaintiff's store in Buffalo, by Troule in person, and were endorsed on the note, of the respective dates before mentioned. The plaintiff's clerk, who proved these payments, also testified that he subsequently saw Troule once in Buffalo and once at his residence in Canada. It was also proved that during the two years preceding the hearing of this cause before the referee, (Sept. 1848,) Troule was "very frequently at Buffalo," and that he was possessed of real and personal estate in *Bertie* worth \$12,000.

The plaintiff proved a judgment on the note against Troule, recovered by default for want of plea, in the recorder's court of the city of Buffalo, on the 26th day of July, 1847, and that an execution had been issued on this judgment to the sheriff of the county of Erie and returned unsatisfied. The referee reported in favor of the plaintiff for the amount due on the note, and the defendants now moved to set aside his report upon the following grounds, the same points having been made before the referee.

1. The guaranty was void by the statute of frauds. It ex-

Burt v. Horner.

pressed no consideration, and the parol proof of the consideration was inadmissible to supply the defect in the written instrument. 2. The plaintiff was guilty of laches in neglecting to sue the maker of the note for nearly seventeen months after its maturity, and the defendants were thereby discharged. 3. The plaintiff was bound to go to Canada and sue Troule there, before the defendants could be made liable on their guaranty.

J. T. Williams, for the defendants.

E. Ford, for the plaintiff.

By the Court, SILL, J. 1. The objection that the defendants' undertaking was within the statute of frauds is disposed of by the case of *Johnson v. Gilbert*, (4 Hill, 178.) The same case, by necessary implication, shows that the objection to the parol testimony, disclosing the character of the transaction, between the defendants and the plaintiff, is also untenable. A written promise, not in conflict with any law, may be upheld when there is a good consideration for it, although it does not appear in the writing itself. It may, in such cases, and this is one, be supported by parol evidence of a consideration, when such proof is consistent with the written instrument.

2. The legal effect of the defendants' obligation is the same as if it had been written in the following form: "We guaranty the collection of the within note *by due course of law*. (*Cumpton v. McNair*, 1 Wend. 457. *Curtiss v. Smallman*, 14 Id. 231.)

The obligation assumed by the plaintiff upon accepting this note and guaranty was, that in case the note was not paid at its maturity, he would, within a reasonable time, and with due diligence, institute against Troule legal proceedings for the collection of the note, and prosecute them, without delay, to consummation. This was a condition precedent to the liability of the defendants upon their guaranty, and imposed upon the plaintiff the duty of diligence not only in the manner of the prosecution, but also in its institution.

It was said on the argument, that diligence is a mixed ques-

Burt v. Horner.

tion of law and fact, and was settled in favor of the plaintiff by the finding of the referee, and on this point we are referred to *Backus v. Shipherd*, (11 Wend. 634,) and *Thomas v. Wood*, (4 Cowen, 173.) Such was the doctrine there intimated as applicable to those particular cases; for the existence of the facts which it was contended excused the delay in those cases, was a question not decisively settled by the evidence. But where there is no dispute about the situation and circumstances of the parties, and no question as to the steps which have been taken or omitted by the plaintiff, against the principal debtor, the question of due diligence is, by all the authorities, regarded as one of law. In this case there is no dispute about the facts bearing upon the points under examination. The maker of the note lived in Canada from the time it was made until the hearing. He was twice at the plaintiff's store within one month after it fell due; and was afterwards, and up to Sept. 1848, "very frequently in Buffalo." It must also be assumed, from the place where the note is dated, and other unquestioned facts in the case, that the plaintiff knew, when he received the note, that the maker lived in Canada. Here then is a delay of all proceedings against Troule from the 20th of February, 1846, until July, 1847, a period of nearly or quite seventeen months, sought to be excused upon the ground, solely, that he was a non-resident, and that having no property within the jurisdiction of the courts of this state, an earlier prosecution would not have secured the collection of the debt.

In *Moakley v. Riggs*, (19 John. 69,) the court held that the omission for seventeen months to prosecute the maker of a note, discharged the guarantors. The same question came up again in *Kies v. Tift*, (1 Cowen, 98,) and was again decided the same way; the delay, however, in the latter case, being for a much shorter period.

It is said by the plaintiff's counsel, that these cases are in conflict with the later one of *Thomas v. Wood*, (4 Cowen, 163.) The defendant in that case guaranteed the collection of a bond and mortgage given February 8, 1809, to secure the payment of \$1200 with interest. The interest was to be paid

Burt v. Horner.

annually, on the 1st day of March in each year, and the principal in three instalments on the 1st day of March in the years 1814, 1818, and 1822. The mortgagor failed to make the payment falling due on the 1st day of March, 1814, as well as prior instalments of interest. The plaintiff did not sue him on the bond until after the May term of the supreme court in 1814, but perfected a judgment at the next term, and failing to collect the money, foreclosed the mortgage and sold the land the next December. It appeared that the principal debtor was wholly insolvent in and prior to March, 1814. The proceeds of the land paid what was due at the time of the sale, and part of the instalment falling due in 1818. Immediately after the latter became payable, a new execution was issued on the judgment against the principal debtor and returned unsatisfied, and the defendant was then prosecuted on his guaranty. It is to be observed, that in the case cited it was the instalment of 1818, not that of 1814, the payment of which the defendant was resisting. The first had already been paid out of the property of the principal debtor, and the defendant was insisting that he was discharged, not by reason of any want of diligence, in proceeding against the principal in 1818, but because the plaintiff had not used the utmost possible dispatch, in collecting the payment falling due four years before, and for which no claim was made upon him. The case decides that suffering the May term to pass without suing the principal debtor, on the first instalment, it appearing that this delay could not by possibility prejudice the defendant, did not discharge him from liability upon the second instalment, in reference to which there was no pretence of laches. This is really the point in the case, though much was said aside from it. And when the learned judge said that certain remarks in *Kies v. Tift* were *obiter*, he did not perhaps reflect, that much of what he was then saying was subject to the same criticism.

But it was not intimated even there, that an indefinite delay could be excused by any circumstances. The doctrine of the former cases is not questioned, but fully recognized. It is simply and truly said that they were not applicable to the case

Burt v. Horner.

of *Thomas v. Wood*. Mr. Justice Woodworth, in the latter case, remarks, "whatever may be the effect of letting a term pass, there is *no doubt* that seventeen months' delay would discharge from the guaranty." Mr. Justice Sutherland says, "the expression that a term should not be permitted to pass, is to be taken in connection with the facts of those cases. There *was great and unnecessary delay* in both." The most that can be claimed even from the *obiter* remarks in *Thomas v. Wood* is, that suffering a term to pass which occurs two months after the demand matures, may, under peculiar circumstances, be reconciled with reasonable diligence in the prosecution of the principal; though this is not a question really presented by the facts of that case. It is not perceived that these several authorities are in conflict. They all alike have been constantly cited as consistent authority for showing that the guarantee must be early and diligent in prosecuting the principal debtor if he would retain the liability of his guarantor. (See 5 *Wend.* 509; 1 *Id.* 461; 21 *Id.* 258.)

In *Backus v. Shipherd*, the note was transferred and guaranteed after it matured. Four months after the transfer judgment was obtained against the maker. Some facts being controverted in that case, they, with the question of due diligence, were submitted to the jury, and their finding in favor of the plaintiff was sustained by the court. That the rule by which the question of due diligence is to be tried should be qualified and relaxed, in some degree, where the guaranty is made after the demand is due, need hardly be mentioned. But if this were otherwise, the case of *Backus v. Shipherd* would not sustain the decision of the referee in this case.

The question is not whether the defendants have been injured by the delay, but whether the plaintiff has performed his contract—the condition precedent to his right to call on them. A compliance on his part with the terms of the guaranty is indispensable. Parties may agree upon such terms as they please, as a condition of liability, and the courts cannot substitute other stipulations for them. None of the cases profess to do this; but where there has been delay the courts have, in

Burt v. Horner.

some instances, held it to be consistent, under the circumstances disclosed, with reasonable diligence, and hence that there was a performance of the condition precedent.

None of those circumstances which have been supposed to make a short postponement of the prosecution of the principal consistent with reasonable diligence, are found in the present case. Troule was twice at the plaintiff's store in Buffalo after the note fell due; and the fact of his non-residence, so far from excusing the plaintiff from proceeding against him there, required him promptly to embrace these opportunities for complying with the conditions of the guaranty, and of protecting the interests of the defendant, which had been confided to him, and the duty of maintaining which he had assumed.

But if the omission to proceed against Troule there can be made consistent with the plaintiff's obligation, how can he get over the subsequent delay of sixteen months? It is said he did not know that Troule had been in Buffalo. But we find him making no exertions to inform himself how this was. And even if such exertions had been made, a failure on his part to learn the facts as they really existed, would be a very questionable excuse for his negligence. His duty was a very plain one; that is, to place process for Troule in the hands of the sheriff, which would have protected him in any event, and probably in the present case have secured a much earlier judgment. There is, if possible, still less force in the suggestion that the plaintiff was not bound to proceed against the maker of the note because he had no property within reach of the process of the court. This is striking at the very contract itself, and asking us to make new stipulations between the parties. The only reason why a *guarantor is ever liable* on a contract like this, is that the principal debtor has not property within the reach of the process of the court to satisfy his obligation; and the argument of the plaintiff's counsel, carried out, would dispense with prosecution in every such instance, and substitute for it evidence of the maker's insolvency. Here neither the residence, pecuniary ability, situation of their property, nor any other circumstances of the parties to this paper have changed

Burt v. Horner.

since the guaranty was made. The parties to the suit understood then what would be the result of a suit against the maker in Erie county, as well as they know it now. The defendants having then all the light they have now, exacted, and the plaintiff assumed, the responsibility of an early and diligent prosecution of Troule, as a condition precedent to their liability; and it does not lie with him now to say that they exacted, and he undertook to perform, a mere idle ceremony. They had a right to make such a contract, and the court cannot assume to make one in its stead, which might be supposed more practical and sensible.

It was contended, on the argument, that if the defendants had not been prejudiced by the delay, it constituted no defence, and that the burden of showing that they were prejudiced lay on them. The point is partially involved and has been sufficiently examined in the consideration of those which have preceded it. It only remains briefly to advert to the authorities cited to sustain it. They are all, (with a single exception which is noticed below,) decisions upon the ordinary contract of suretiship, and are not applicable to contracts of guaranty. The distinction between them has been already sufficiently indicated in stating the character of the obligation under consideration.

In *Backus v. Shipherd*, (11 Wend. 635,) Mr. Justice Nelson says, "a proceeding to judgment and execution is at least prima facie a compliance with the contract. If *beyond this* there was negligence, and more than was done might reasonably have been done to collect the debt, and a loss ensues, *it lies on the defendant* to show the loss, and that it was occasioned by such negligence or omission." These remarks, a reference to the case will show, as indeed the extract itself shows, were not intended to apply to a question of diligence in commencing a suit. That question had already been examined by the learned justice, and disposed of. What he here said referred to the exertions and diligence which the plaintiff was bound to use to secure the debt, after he had duly perfected a judgment. In that case the judgment against the principal debtor was re-

Burt v. Horner.

covered in a justice's court, and the guarantor objected that a transcript had not been filed in the county clerk's office, and an execution issued to the sheriff. The remarks of the judge, quoted above, were made in discussing this point; and he held that the guarantor was not discharged by this omission, unless it was shown that these steps would have secured the collection of the debt. It is hardly necessary to say that they have no application to the present case.

Thus far the examination has proceeded upon the assumption that the plaintiff could comply with the conditions of the guaranty by prosecuting Troule in this state. We think, however, he was bound to proceed against him in Canada. *White v. Case*, (13 Wend. 543,) is cited as an authority the other way. In that case, when the note was made and when the contract of guaranty was entered into, the parties to both contracts resided in this state, and the maker left it about the time the note matured. It was held, under the circumstances of that case, that the plaintiff was not bound to follow the principal debtor to another state and sue him there. It is said there that the guaranty implied not only an obligation that the maker was able to pay, but that he would be in a situation to be sued in the state *where the contract was made*. The plaintiff's counsel understands the court as referring, in these remarks, to the place where the contract of guaranty was made. We do not think this is what was intended; but that reference is had to the contract of the party who is to be sued—the maker of the note. When he resides in one state and the guarantee in another, it would be a strange construction of a simple contract of guaranty to hold it to imply that the maker of the note should change his place of residence and remove to that of the guarantee. That this was not meant, is shown by other remarks of the learned judge in the case referred to. "The term collection," he says, "is alone equivocal, and should receive an interpretation in reference to the subject matter of the contract, and *the situation or condition of the maker*." Such we deem a reasonable and correct rule of interpretation, to be applied to the contract in this case. This note was dated in

Burt v. Horner.

Canada. The maker resided there when it was made, and when the plaintiff received it, and when he assumed to use the proper means to collect it. Troule's property is presumed to be at the place of his domicile; indeed, it is proved to be there, and that he is abundantly able to pay this demand. With all these facts in view, at the time the contract between the parties to this suit was made, what was it understood by them that the plaintiff had undertaken to do, by agreeing, to collect the note of the maker "by due course of law?" Was it supposed that the duty would be performed by a nugatory proceeding in the recorder's court of the *city of Buffalo*? Troule's person was not liable to arrest, and his property was not within reach of the process of the court, and they must have foreseen that a suit here would result in nothing but useless expense. Giving the contract a construction which will make the defendants liable, upon the performance of this idle ceremony, would change its character, and make it virtually a guaranty of payment, instead of a guaranty of collection—a contract which the parties were competent to make for themselves, if they had so intended. The terms upon which the note was received by the plaintiff, imposed upon him the duty of looking in good faith to the interests of the defendants in his attempts to collect the debt of the maker. He was bound, for this purpose, to do for them (the circumstances remaining such as the parties contemplated when the guaranty was made) what a discreet and careful man would have done in this respect for himself. This we think required the plaintiff to prosecute Troule where his residence and property were—before calling upon the defendants; and for this reason the suit cannot be maintained.

Although we have found no reported case presenting this precise question, still there are authorities which we think justify the distinction we have made between this case and that of *White v. Case*. It has been held that in order to fix an endorser of a promissory note not payable at a particular place, it was not necessary to demand it of the maker who, *after it was made and before it matured*, removed from the state; but that a demand at his last place of residence *in this state was*

The People v. Millis.

sufficient. (*Cumming v. Fisher*, *Anthon's N. P.* 1, and notes. And see a reference to an unreported case, 14 *John.* 117.) But where the maker resides out of the state when the note is made, the demand must be made at his residence. (*Gilmore v. Spies*, 1 *Barb. Sup. Court Rep.* 158.) The principle which distinguishes those cases we think applies to this, and distinguishes it from that of *White v. Case*. The case of *Shultz v. Palmer*, (11 *Wend.* 367,) bears somewhat, though more remotely, upon the same point.

The motion to set aside the report of the referee must be granted; the costs to abide the event of the suit.

ALBANY GENERAL TERM, March, 1849. *Harris, Watson, and Parker*, Justices.

THE PEOPLE vs. MILLIS.

A recognizance taken from the prosecutor of a criminal complaint before a police justice, containing the condition required by the statute that the prosecutor will appear and testify at the next court having cognizance of the offence, &c. will not be vitiated by the addition of the words "as well to the grand as the petit jury, and not depart the said court without leave."

Where the condition of a recognizance taken before a police justice is to do an act for which a recognizance may properly be taken, and the police justice had authority, in law, to act in cases of that general description, a declaration upon such recognizance need not aver the existence of the particular facts and circumstances which gave the officer authority to take it.

DEBT on recognizance. The declaration alleged that "heretofore, to wit, on, &c. at, &c. one Matthew Kirby was brought before John O. Cole, a justice of the peace and police justice of the city of Albany, charged on the oath of the defendant John Millis, and others, with having assaulted and beaten the said John Millis with a deadly weapon with intent to kill him the said John Millis. And the said John O. Cole so being such jus-

The People v. Millis.

tice of the peace and police justice, after hearing the examination of the said John Millis and the witnesses produced on the part and behalf of the said people, did then and there adjudge and decide that the offence so as aforesaid charged against the said Matthew Kirby had been committed, and that there was probable cause to believe that the said Matthew Kirby had been guilty thereof. And the said John O. Cole so being such justice of the peace and police justice as aforesaid, did then and there require the said John Millis to enter into a recognizance to appear and testify at the next court having cognizance of the said offence, and in which the said Matthew Kirby might be indicted. And thereupon the said John Millis did then and there, before the said John O. Cole so being such justice of the peace and police justice as aforesaid, (the said John O. Cole having full and competent power and authority in the premises,) enter into a recognizance in writing subscribed by him the said John Millis, by which recognizance the said John Millis acknowledged himself to be indebted to the people of the state of New-York in the sum of one hundred dollars, to be made and levied of his goods and chattels, lands and tenements, to the use of the said people if default should be made in the condition of the said recognizance—which condition was that if the above bounden John Millis (the said defendant) should personally be and appear at the next mayor's court to be held in and for the said city or county of Albany, to give evidence on behalf of the said people against Matthew Kirby for feloniously assaulting and beating the said John Millis with a deadly weapon, *as well to the grand jury as to the petit jury, and not depart the said court without leave.* And upon the performance of the said condition the said recognizance was to be void and of no effect, otherwise to remain in full force and virtue. The declaration then alleged that said recognizance was afterwards duly filed in the office of the clerk of the county of Albany at the City Hall in the city of Albany, the said clerk then and there being clerk of the said mayor's court. That a mayor's court in and for the city of Albany exercising criminal jurisdiction, was held at the City Hall in the said city of Albany before

The People v. Millis.

the judges of the same court on, &c. being the next court holden after the signing and acknowledgment of the said recognizance; having cognizance of the offence charged against the said Matthew Kirby, and in which said court the said Matthew Kirby might be indicted. That the said recognizance was then and there filed and became a record of said mayor's court. That at the said term of the said court Millis failed in the performance of the condition of said recognizance in this, that the said John Millis being then and there called in open court, (and during the sitting of the grand jury,) to wit, on, &c. did not personally be and appear at said court and give evidence on behalf of the said people against the said Matthew Kirby for the offence aforesaid, pursuant to the condition of the said recognizance, but therein wholly failed and made default; whereupon an order was entered by the said court forfeiting the said recognizance and directing the same to be prosecuted according to law. Averment, that the defendant had not paid the said sum of one hundred dollars so as aforesaid acknowledged by him to be owing to the said plaintiffs, or any part thereof, and that the said recognizance remained in full force. And that the said plaintiffs had not yet obtained satisfaction of the same nor any part thereof; whereby an action had accrued to the plaintiffs to demand and have of and from the said defendant the said sum of one hundred dollars; assigning a breach.

The defendant demurred to this declaration, and assigned the following causes of demurrer: (1.) That the recognizance was void inasmuch as its condition was not according to the provisions of the statute, the condition of the recognizance requiring additional and different duties or acts of the defendant than the statute authorizes or provides for: (2.) That it was not sufficiently alleged in and did not appear from the declaration, that the police justice or other magistrate who took and required said recognizance had any authority or jurisdiction so to do. (3.) That it was not sufficiently alleged in and did not appear from the declaration, that the magistrate had any jurisdiction or authority to entertain and hold the examination

The People v. Millis.

therein mentioned, or to make any adjudication in the matter. (4.) That the offence mentioned in the condition of the recognizance did not appear to be the one in relation to which the examination and adjudication before the police justice, mentioned in the declaration, was had, or one in relation to which any previous proceedings before said magistrate were had, or one in relation to which the said magistrate had any jurisdiction to entertain an examination or any other proceedings. (5.) That the court mentioned in the recognizance had no legal existence; nor did the said recognizance or the condition thereof require the said defendant to appear before any court known to the laws; or if so, such court was not properly or definitely described in said recognizance or the condition thereof. The plaintiffs joined in demurrer.

A. J. Colvin, for the plaintiffs.

J. Edwards, for the defendant.

By the Court, PARKER, J. I do not think the recognizance sued on in this case is void by reason of any variance between the language of its condition and the provision of the statute. The magistrate is authorized by the statute to "bind the prosecutor and all the material witnesses against the prisoner, to appear and testify at the next court having cognizance of the offence, and in which the prisoner may be indicted." (2 R. S. 2d ed. 592, § 21.) And such is substantially the condition of the recognizance. The addition of the words "as well to the grand as the petit jury, and not depart the said court without leave" cannot vitiate it; for such would be the legal effect of the language of the statute, if it had not been thus expressed in the recognizance. The defendant was required to appear at but one court, and I think he had no right to leave, after having been examined before the grand jury. It might be necessary to call him again before the grand jury in the same case. It might be necessary to have him sworn before the

The People v. Millis.

petit jury. I think he was bound to consider himself a witness during the entire court, unless sooner discharged.

This is not, therefore, like the case of *The People v. Meighan*, (1 *Hill*, 298,) cited by the defendant's counsel. There, a bond taken by a justice of the peace, in a prosecution for bastardy, was held void because, in addition to what was required by law, it contained other provisions imposing further and entirely different obligations on the obligor.

Nor do I think the objection well taken, that the facts are not sufficiently set forth to show that the officer taking the recognizance had jurisdiction. The late case of *The People v. Kane*, (4 *Denio*, 530,) seems to me to cover the whole ground, and to overrule, to some extent, *The People v. Koeber*, (7 *Hill*, 39,) and *The People v. Young*, (*Id.* 44.) In *The People v. Kane* it is said, "where the recognizance has a condition to do some act, for the doing of which such an obligation may be properly taken, and the officer before whom it was acknowledged had authority by law to act in cases of that general description, the recognizance is valid, although it does not recite the special circumstances under which it is taken. And in declaring upon such a recognizance I do not think it necessary to aver the existence of the particular facts which prove that the officer had authority to take it."

The rule thus laid down, when applied to this case, relieves it from all difficulty. The condition of the recognizance was to do an act for which it might properly be taken; and the police justice before whom it was acknowledged had certainly authority in law to act in cases of that general description. In such case there can be no good reason for averring the existence of the particular facts and circumstances which gave the officer authority to take it.

The plaintiff is entitled to judgment on the demurrer, with leave to the defendant to amend on payment of costs.

SAME TERM. *Before the same Justices.*

MORSS vs. STONE.

After evidence has been given by the plaintiff, in regard to a mortgage, without objection, and several inquiries in regard to its contents have been made by the defendant, both parties will be considered as having acquiesced in receiving parol evidence of the mortgage; and the defendant cannot then object to the plaintiff's proving at what time the mortgage fell due.

Receiving goods from another, upon an agreement to sell and account for such goods to the owner, or to return the same, as good as when taken, with interest, amounts to a *bailment* and not to a *sale*; and the property remains in the bailor.

Where, in an action of replevin, there is proof tending to show that a part of the goods replevied does not belong to the plaintiff but to another person, the judge should charge the jury that if they find that any part of the goods belongs to a third person the defendant is entitled to a verdict for the value of those goods.

REFLEVIN, tried at the Greene circuit, in April, 1848, before HARRIS, justice. The goods replevied were taken by the defendant from the possession of one Peter Dutcher, by virtue of an execution against him in favor of Daniel C. Scudder. The plaintiff introduced Dutcher as a witness, on the trial, for the purpose of showing that the property did not belong to Dutcher at the time it was levied on, but to the plaintiff, it having been merely delivered to Dutcher to sell, as a pedler; he accounting to the plaintiff for the goods sold, at certain specified prices, and being entitled to all he should receive beyond those prices, for his own benefit. Dutcher testified that the goods were taken from his possession by the defendant, who claimed to take them by virtue of an execution against him in favor of Scudder; that the goods were in a wagon box or pedler's wagon, with which he was travelling around the country peddling; that he obtained the goods at the plaintiff's store, of Morss the plaintiff, and of Morss & Finch; that after the levy that portion of the goods which belonged to the plaintiff were separated from those belonging to Morss & Finch, and they were inventoried separately; that a price was fixed for the

Morss v. Stone.

goods when he got them, the price he was to pay for them; that witness was to pay when he sold the goods; that he had obtained from the store goods to the amount of about \$200, and had paid the plaintiff or returned on account of the goods, about \$60 or \$70; that a price was fixed for every article, and witness was to pay that sum when the goods were sold, receiving for his own use what profits he could make on the goods, and the goods not sold by him were to be returned; that he had a horse in his possession on which the plaintiff had a mortgage; that the wagon in his possession belonged to the plaintiff and Finch his former partner. The plaintiff's counsel offered to show by this witness that the mortgage was due at the time he peddled. This evidence was objected to by the defendant's counsel, and the objection was overruled. The witness then testified that he thought the mortgage was due the next fall; that before he commenced peddling he gave the following receipt for the first bill of goods: "Received, Prattsville, March 23d, 1847, of N. P. Finch & Co. a stock of goods as per bill this day received from Jasper Carle, to sell and account for to the amount of \$293.86, or return the same as good as when taken, with the interest, and I am to use the wagon and sleigh belonging to said Finch & Co. while selling said goods."

PETER DUTCHER."

The witness testified that in May, 1847, he got some goods of McLean, a partner of the plaintiff, but did not know whether McLean knew of the arrangement with Morss or not; that McLean said he would see Morss, and soon after the witness went and got some goods; that some of these goods were in the lot taken by the defendant. It was proved that McLean was a partner of Morss at the time these goods were obtained. Dutcher also testified that he received from the plaintiff goods at different times during the summer and fall; and that in November he received a bill of goods, for which he gave his note. The judge charged the jury that the principal question in the case was whether the goods delivered to Dutcher were delivered to him to be sold for the plaintiff, or upon an absolute purchase by Dutcher; that the contract under which the goods were re-

MORRIS v. Stone.

ceived was contained in the receipt of the 23d of March ; that upon its face that contract amounted to a bailment and not a sale ; and that if the jury should believe that the goods were delivered upon the terms stated in that receipt the plaintiff was entitled to recover. The judge further charged that although the giving of the note for the November bill of goods was evidence of a sale, it was subject to explanation ; and if from the evidence, they should believe that the goods were in fact delivered upon the terms stated in the receipt, the plaintiff was also entitled to recover as to those goods. To this charge the defendant excepted. The jury found a verdict for the plaintiff, and assessed the value of the property at \$91,75 ; and the defendant having filed a bill of exceptions, moved for a new trial.

H. Hogeboom, for the plaintiff.

D. K. Olney, for the defendant.

By the Court, PARKER, J. I think the learned justice, before whom this cause was tried at the circuit, decided correctly in receiving parol evidence to show when the mortgage held by the plaintiff on Dutcher's horse became due. The defendant's counsel had previously given some evidence in regard to that mortgage, and this objection was not made till the plaintiff's counsel had also made several inquiries in regard to its contents. The defendant's counsel could not then object to proving the single fact when the mortgage fell due, without also objecting to all the previous evidence of its contents. I think it must be held that both parties had acquiesced in receiving parol evidence of the mortgage. As to the materiality of the evidence, it was certainly proper to prove when the mortgage fell due, with a view to ascertain whether the plaintiff had obtained an absolute title to the property mortgaged. (*Pierce v. Patchin*, 12 Wend. 61.) I concur also entirely in the decision made at the circuit, that the receipt of the 23d of March, upon its face, showed a contract of bailment, and not a sale. (*Hurd v. West*, 7 Cowen, 752.) It was not at all like

Morss v. Stone.

the case of *Marsh v. Nickerson*, (14 *John. Rep.* 167,) relied on by the defendant's counsel. If the contract between Morss and Dutcher was in accordance with the receipt, it is clear that the title to the property continued in the plaintiff.

I do not understand that the judge at the circuit decided, as the defendant's counsel supposes, that the goods were delivered upon the terms mentioned in the receipt; though there is certainly one expression in the charge from which, standing alone, that would seem to have been said. On the contrary, the whole charge taken together, shows that that question was properly submitted to the jury as a question of fact for their determination.

But there is another point made by the defendant's counsel, that seems to me to be well taken. The court was asked on the trial to charge the jury, that if they should find, from the evidence, that Dutcher had any goods of McLean, or of Morss & McLean, for which he gave his note, which were levied on by the defendant, the defendant must have a verdict for the value of those goods. The court refused so to charge, and the defendant's counsel excepted. I think the judge should have charged as requested. There was proof tending to show that goods had been purchased of McLean when a partner of Morss, a part of which had been replevied; and it was for the jury to find whether any of the goods, when replevied by the plaintiff, belonged to any other person. If they should find any of the goods belonged to McLean or to Morss & McLean, the defendant would have been entitled to a verdict for such goods, and to a return of the property.

I think this question should have been submitted to the jury; and it not having been so submitted, a new trial should be granted; costs to abide the event.

New trial granted.

SAME TERM. *Before the same Justices.*

HUBBELL & CURRAN vs. CARPENTER.

H. & C., after having recovered a judgment against E., the principal debtor, assigned the same to M., together with the execution issued thereon, and all moneys due on the same, and the property already sold upon the execution and bid in by H. & C., giving M. the right at all times to control the execution; but reserving to the assignors the right to enforce a judgment obtained by them against C., the surety of E. for a part of the same debt. At the same time H. & C. gave to E. a receipt, in which they promised and agreed not to enforce any claim under or by virtue of their judgment against him, or on the note upon which that judgment was obtained; *Held*, that H. & C. had by the arrangement made with M. & E. in effect released E. from all further obligation to pay that part of their debt for which C. was liable as surety; and that having disabled themselves from collecting their debt of E., the principal debtor, or from transferring the right to enforce collection to C., the surety, upon his paying the debt, they had exonerated C. also. PARKER, J. dissenting.

In equity, an endorser does not lose his character of surety by the recovery of a judgment against him upon the original security.

Although there is no duty of active diligence imposed upon a creditor for the protection of a surety, yet on the other hand, if by his own active interference the creditor suspends his own right, and consequently the right of the surety, if he shall claim his privilege of substitution, to proceed for the collection of the debt against the principal debtor; or if the creditor relinquishes any security he may hold for his debt, or surrender any funds he may hold applicable to its payment, he, to that extent, at least, exonerates the surety. *Per* HARRIS, P. J.

The proper inquiry, in every case, is not what degree of diligence the creditor has exercised in the collection of the debt; nor with what degree of negligence he is chargeable, but whether he has, *by his direct acts*, injured the surety. *Per* HARRIS, P. J.

IN EQUITY. On the 27th day of September, 1843, the plaintiffs recovered against the defendant as endorser of a note for \$200, made by one Ellis, a judgment for \$259.60. They had, on the 30th of March previous, recovered a judgment against Ellis for \$843.68, upon other demands against him, including also the note endorsed by the defendant. A part of the judgment against Ellis was paid by his assignees. Subsequently an execution was issued for the balance of the judgment and levied upon personal property in his possession, which was advertised for sale. On the day of sale, and after a

Hubbell v. Carpenter.

portion of the property had been sold, an arrangement was made between the plaintiffs and Ellis and one McCumber, who claimed to be the owner of some of the property levied upon, whereby further proceedings upon the execution against Ellis were suspended. An assignment was executed by the plaintiffs to McCumber, as follows: "Supreme Court—Alrick Hubbell and Edward Curran *vs.* Joseph P. Ellis. For and in consideration of two hundred dollars, and other valuable considerations, we hereby sell, assign and convey unto John McCumber the judgment and execution in this cause, and all the moneys due on the same, with the right at all times to *control the said execution*; and also, the following personal property: a quantity of cheese; one sow and six pigs; lot of hay in J. P. Ellis' shed; hay and straw in back shed, on both sides; hay in the bay; a quantity of barley; peas in the barn; oats in the field; span of horses, harness and wagon; pile of boards and all the property this day sold under and by virtue of an execution issued on the said judgment and bid in by us. *This assignment is not to impair the right of the said Hubbell and Curran to collect and enforce all the collateral securities with said judgment now in their hands.* It being understood that we hold no collateral securities except a judgment against Hiram Carpenter and a small balance on a note against McDonough. Dated August 21, 1845.

HUBBELL & CURRAN."

At the same time the plaintiffs gave Ellis a receipt in the following words: "August 21, 1845. Received of Joseph P. Ellis one dollar, in full of all demands except a judgment in the supreme court in favor of Hubbell & Curran, against said Ellis, this day assigned to John McCumber; but this receipt is in no way to affect our rights and claims under a judgment in our favor against Hiram Carpenter, as the endorser of said Ellis. And we promise and agree not to enforce any claim under or by virtue of said judgment against said Ellis, in any way or manner whatever, or on the note upon which said judgment has been obtained. HUBBELL & CURRAN."

About \$300 had been paid to the plaintiffs by the assignees

Hubbell v. Carpenter.

of Ellis before the execution was issued. They had also received, upon a bond and mortgage which had been transferred to them by Ellis as security, about \$320, and a note against one McDonough for about \$46. The property upon which the execution was levied was worth about \$500. The amount paid by McCumber on the 21st of August, 1845, was \$200.

On the 17th of November, 1845, the plaintiffs commenced this suit. The bill was a creditor's bill containing the usual allegations. The answer set up the matters before stated, in defence. The cause was heard upon pleadings and proofs at the Albany special term in February, 1848, before Mr. Justice PARKER, who made a decree declaring the plaintiffs entitled to collect the amount of their judgment remaining unpaid, and directing a reference to ascertain such amount. (*See 2 Barb. Sup. Court Rep. 484, S. C.*) A rehearing having been ordered, the cause was reheard at a general term of this court.

J. K. Porter, for the plaintiffs.

H. Carpenter, defendant, in person.

HARRIS, P. J. I think the fair import of the instruments executed by the plaintiffs on the 21st of August, 1845, is, that in transferring the judgment against Ellis to McCumber, the plaintiffs intended to reserve such amount of the judgment as should be necessary to enable them to collect the judgment against Carpenter. And although they stipulated that they would refrain from all further proceedings for the collection of the amount of the judgment so reserved, from Ellis, it was understood that such stipulation should not interfere with their right to collect what they could of Carpenter. It was not denied, upon the argument, that the transaction was binding upon the parties; and the question is thus presented whether a creditor, after the recovery of a judgment against his principal debtor and his surety, may enter into such an arrangement as shall, in effect, release the former, without affecting his right to recover his debt of the latter.

Hubbell v. Carpenter.

There can be no doubt that such an agreement between the creditor and the principal debtor, *before judgment*, would operate to discharge the surety. The maker of a note is primarily liable for its payment; the endorser is considered as a surety for the performance of the maker's promise. (*Chitty on Bills*, 292.) And it is said that, although "there is no obligation of active diligence on the holder to sue the acceptor or maker, or any other party, and he may forbear to sue as long as he chooses, yet he must not so agree to give time to the acceptor or maker as to *preclude himself* from suing him and suspend his remedy against him in prejudice of the drawer or endorser." The rule is clear and indisputable that if, before judgment, the creditor do any thing which disables him from proceeding against the maker or acceptor, the endorser is discharged. He is entitled, as a matter of right, upon payment of the debt, to be substituted in the place of the holder. "The creditor," says Chief Justice Bronson in *Bangs v. Strong*, (7 Hill, 250,) "must be in such a situation that when the surety comes to be substituted in his place by paying the debt, he may have an immediate right of action against the principal." In the case under consideration it is admitted that the plaintiffs have, by a binding engagement, disabled themselves from proceeding against Ellis, the principal debtor. But it is insisted that the endorser lost his character of surety by the recovery of the judgment against him. It is true that there are not wanting respectable authorities which favor the position that the distinction between principal and surety ceases after judgment has been obtained upon the original security. Indeed, I am inclined to think that it is only by resorting to a court of equity, which is said to be the surety's peculiar forum, that he can, after his liability has been fixed by the recovery of a judgment, obtain the relief to which the transactions between the creditor and his principal may entitle him. In *Pole v. Ford*, (2 Chitty's Rep. 125,) which is made a leading case in sustaining the doctrine that the character of surety is extinguished by the judgment against the endorser, and that thenceforth he becomes a principal debtor, a motion was made to enter satisfac-

Hubbell v. Carpenter.

tion of a judgment against the drawer of a bill of exchange, or that the plaintiff might be prohibited from issuing execution upon the judgment, upon the ground that after having issued execution against the acceptor and taken his property in execution, the plaintiff had abandoned his levy and given further time for payment to the acceptor. The motion was denied, and the report of the case states that the court determined that the withdrawing the *fi. fa.* against the acceptor did not discharge the drawer, and that the rule, that giving indulgence to an acceptor without the consent of the drawer discharges such drawer, *does not apply after judgment.* A similar motion was made in *Braine v. Monson*, (8 *Mees. & Wels.* 668,) which was also denied. In that case Parke, baron, said "the case of *Pole v. Ford* is an express authority, that where judgment has been signed against one of the parties to a bill or note, the court will not interfere, *on affidavit*, to set aside the judgment and stay proceedings in an action against another party. A regular judgment cannot be affected by the discharge of a prior party. There is no relief *unless there be a remedy in a court of equity.*" So in *La Farge v. Herter*, (3 *Denio*, 157,) it was held, in an action of debt, brought upon a judgment which had been recovered against a principal and surety, that the fact that an execution had been levied upon the property of the principal debtor and then withdrawn upon receiving security to pay at a future day, did not constitute a legal defence to the action. The court in deciding this case do not seem to have had in mind the distinction between a defence at law and relief in equity in such cases; for the authorities cited by Justice Beardsley are, with the exception of *Pole v. Ford*, cases arising in equity. Although none of these authorities are directly in point to sustain the decision, I am not disposed to question its correctness. On the contrary, I think the conclusiveness of the judgment upon the parties to it, is sufficient to exclude a defence at law founded upon the relation of principal and surety existing between the defendants in the judgment prior to its recovery. The form of the judgment rendered the defendants alike liable as principal debtors, and perhaps,

Hubbell v. Carpenter.

after judgment, it was not in the power of a court of law to apply the principle which prevails as well in courts of law as in equity, in all cases where the relation of principal and surety can be recognized. But because relief may not be granted at law after judgment, it does not follow that the principle ceases to exist. The principle itself is founded in the moral injunction which requires every man so to exercise his own rights as not to injure others. Of course it is as applicable after judgment as before.

This question came before the supreme court of Pennsylvania, in the case of *The Manufacturers' and Mechanics' Bank v. Bank of Pennsylvania*, (7 Watts & Serg. 335.) In an elaborate opinion delivered by Chief Justice Gibson, he examines the position which had been contended for in that case, that the relation of surety which the endorser of a note had borne to the maker was extinguished by the judgment against him. "The engagement of the endorser," he says, "is to pay, if the maker do not. And the holder should not be allowed to compel him to pay after having first deprived him of the chance of being relieved by payment by the maker. It may be that his engagement ceases to be *conditional* at the rendition of the judgment; but he is not the less a *surety* and may yet be injured by the conduct of his principal. The root of the error seems to consist in taking for granted that when the engagement of the endorser ceases to be conditional he necessarily ceases to be a surety. The engagement of a surety in a bond is unconditional from the first; and his right to compel the obligee to sue would be of little avail were the latter bound to proceed no further than judgment. The surety might pay the debt, it is true, but it has been gravely doubted whether the judgment would not, *ipso facto*, be discharged. He is not, however, bound to pay it before he can at least indirectly originate an action on the security; it being clear, as was held in *Wright v. Simpson*, (6 Ves. 734,) that on depositing a sum sufficient to cover the expense he may compel the creditor to do the best he can for him by collecting the debt of his principal. And in that respect equity falls even behind the civil law, which

Hubbell v. Carpenter.

requires the principal to be sued in the first instance. In that case separate judgments had "been recovered against the maker and endorser of a note, on the 10th of May, 1841. On the 13th of October following, the plaintiffs in the judgments entered into a stipulation with the maker, to stay proceedings against him for one year, provided he should, on the 3d of November ensuing, pay the interest on the judgment up to the time when the new credit would expire. The interest not having been paid, the stipulation became inoperative, and yet it was held that, inasmuch as there was an effectual stay of proceedings from the time the stipulation was executed to the time when the interest was to be paid, the endorser was discharged. (See also *Commonwealth v. Miller's Administrators*, 8 Serg. & R. 452.)

In *Dixon v. Ewing's Administrators*, (3 Ohio Rep. 280,) a judgment had been recovered upon a bond executed by a principal and two sureties. Execution having been levied upon the property of the principal, it was released. An attempt having been made, subsequently, to collect the judgment, of the sureties, they filed their bill to restrain the collection. The court say, "the judgment creditor was bound at least to let the law take its course without interfering to exempt the principal debtor or to relieve his property in such a way as to increase the risk of the sureties. He had no right to interpose for the protection of the principal or his property, by discharging either from the debt, to the injury of the sureties." A perpetual injunction was granted. The same question came before the court again in the case of *The Commercial Bank of Lake Erie v. The Western Reserve Bank*, (11 Ohio Rep. 444.) In that case judgment had been recovered against two principal debtors and one Clarke as surety. Lane, Ch. J. says, "Whether a surety can claim his privilege after judgment, is a point which has given rise to conflicting opinions, and in recent cases the doctrine is doubted or denied. (*Pole v. Ford*, 16 Eng. Com. Law, 273. *Bay v. Tallmadge*, 5 John. Ch. 305. *Lenox v. Prout*, 3 Wheat. 520.) But I am instructed by my brethren to announce it as the opinion of a majority of the court,

Hubbell v. Carpenter.

that they entertain no doubt of Clarke's right to assert this privilege."

The same doctrine has, I think, been substantially held by the court of chancery of this state, and concurred in by the court for the correction of errors. *Bangs v. Strong*, (10 *Paige*, 11,) was a creditor's bill filed against two judgment debtors, J. Strong and M. Strong. The defendant M. Strong interposed a plea in bar, alleging that the judgment was recovered upon a bond in which he was merely a surety for J. Strong. And that after the recovery of the judgment an agreement had been entered into between the plaintiffs and J. Strong, the principal debtor, whereby the plaintiffs were to receive the conveyance of certain land, the price of which was to be ascertained by subsequent appraisal, in part payment of the judgment, and giving ten month's further time for the payment of the balance. The chancellor held, upon the state of facts presented by the plea, that the surety was discharged, upon the ground that the agreement had the effect to prejudice his right to substitution. Justice Bronson, in pronouncing the unanimous decision of the court of errors, affirming the decree of the chancellor, says: "Where time is thus given to the principal debtor, by a valid agreement, which ties up the hands of the creditor, though it be but for a single day, it is quite clear that the surety is discharged." It is true, as was remarked by the learned justice whose opinion is the subject of this review, that the distinction between the rights of a surety, before and after judgment, does not seem to have been taken by the counsel for the plaintiffs in that case; nor is it discussed in the opinion either of the chancellor or Justice Bronson. Yet it must also be admitted that the precise question was there involved, and if the distinction sustained by my learned brother exists, that case was erroneously decided. I should be unwilling to come to this conclusion until constrained by opposing authority entitled to equal respect. Such authority is supposed to be found in three cases which I propose briefly to examine.

The first, in point of time, is that of *Lenox v. Prout*, (3 *Wheat*. 520.) In that case Prout was endorser of a note made

Hubbell v. Carpenter.

by one Deblois. Judgments having been recovered against both maker and endorser, the plaintiffs, at the request of Prout, who offered to point out to the marshal property of Deblois upon which he could levy, issued an execution against the latter, but countermanded it before any thing further was done. The circuit court, in which a bill had been filed by the endorser, granted a perpetual injunction to restrain the collection of the judgment against him. The decree was reversed upon appeal. Justice Livingston, in delivering the opinion of the court, holds the following language: "When the creditor has proceeded to judgment against both, he is at liberty to issue an execution or not, as he pleases, on the judgment against the maker, without affording any cause of complaint to the endorser; or if he issues an execution he is at liberty to make choice of the one which he thinks will be most beneficial to himself, without any consultation whatever with the endorser on the subject. Nor ought he to be restrained, by any fear of exonerating the endorser, from countermanding the service of any execution which he may have issued and proceeding immediately, if he chooses, on the judgment against the endorser. And the reason is obvious; for by the judgment they have both become *principal debtors*, and if the endorser suffers any injury by the *negligence* of the judgment creditor, it is clearly his own fault, it being his duty to pay the money, in which case, *he may take under his own direction the judgment obtained against the maker.*" There is nothing in the decision, or in the reasons upon which it is founded, at all in conflict with any of the cases already noticed. All agree that mere forbearance or delay in collecting from the principal debtor furnishes no ground upon which the surety can claim to be exonerated. To entitle the surety to relief there must have been some active interference of the creditor, operating to the prejudice of his right of substitution. It is true, as was said by the learned judge, that if Prout suffered, it was his own fault. When the creditor refused to proceed with the execution, if he would have protected himself, he should have paid the judgment against the maker of the note, and thus himself have obtained the control of it. The creditor had

Hubbell v. Carpenter.

done nothing to prevent his doing this, and therefore it was properly held that the surety was not absolved from liability.

The next case is *Bay v. Tallmadge*, (5 John. Ch. 305.) There Tallmadge had sued one Platner, and Bay and Bachman had become bail to the arrest. Special bail not being put in, Tallmadge brought a suit against Bay and Bachman upon their bond, and recovered judgment against them for the amount of his debt against Platner, with interest and costs. Upon this judgment an execution was issued, and levied upon the property of the defendants. It was then agreed between the parties to the bail bond suit, that a judgment should be perfected against Platner, and that proceedings in the bail bond suit should be stayed, until the event of the measures taken to recover the debt of Platner should be ascertained. Under this agreement an execution was issued against Platner, and his property advertised for sale. The sale was once postponed, with the consent of the bail, and against the will of the plaintiff. Subsequently a further postponement was agreed to by Tallmadge, without the assent of the bail, who filed their bill against the plaintiff in the judgment, praying that he might be restrained from further proceedings against them, on the ground that by the postponement of the sale without their consent they were discharged from their obligation to pay the debt. Chancellor Kent held that the bail had lost their privileges and had become fixed as principal debtors; that all they had a right to require was the fulfilment of the agreement in good faith, which implied nothing more than reasonable diligence in making efforts to collect the debt of Platner; that such efforts were to be made under the guidance of a reasonable discretion, and as it appeared that the postponement of the sale was granted in good faith and from humane motives towards the debtor, it would not be consonant to the principles of a court of equity to punish the creditor with the loss of his debt for a reasonable forbearance to the debtor; that "*it would be giving too severe and rigorous a construction to the agreement.*" The chancellor adds, "if Bay and Bachman were dissatisfied with the second adjournment, they should have come forward and offered

Hubbell v. Carpenter.

2 payment and called for an assignment of the judgment for their indemnity." Thus the chancellor recognizes the right of the bail to substitution. And it is evident from the facts of the case that nothing had been done to impair this right. No security had been relinquished, and there was no binding agreement for delay. Upon no principle applicable to the relation of principal and surety could the bail justly claim that they had been absolved from their obligation to pay the debt.

One other case deserves to be noticed. It is that of *Findlay, s Executors v. The Bank of the United States*, (2 McLean, 44.) There a judgment was recovered by the bank against Sutherland and Findlay—against the former as maker and the latter as endorser of a note. The judgment had become a lien and an execution had been levied upon the real property of Sutherland. After this, by an arrangement between Sutherland and the bank, his property was conveyed to the bank and applied upon his other indebtedness to the bank, leaving the property of Findlay liable for the judgment against him. Upon a bill filed by the executors of Findlay, for relief, Mr. Justice McLean held that, though Findlay had been an accommodation endorser for Sutherland, his character as surety was merged in the judgment, and that the only equity remaining in his favor was the right of substitution, on the payment of the judgment. That case undoubtedly goes the entire length of deciding that, *after judgment*, the liability of the surety is in no respect affected by the acts of the creditor; and that, whatever may have been done to impair his security, he is bound, absolutely bound, to pay the judgment.

I certainly am not disposed to undervalue the decision of a judge so enlightened, presiding in a court of such eminence, and I might feel inclined to bow to the authority, were it not as I conceive, opposed to the opinions of other judges, equally distinguished, as well as contrary to my own views of common justice. The doctrine of every other case with which I have met in my researches, which have been somewhat diligent, is, that on the one hand there is no duty of active diligence imposed upon the creditor for the protection of the surety; and on

Hubbell v. Carpenter.

the other hand, that if by his own active interference the creditor suspend his own right, and of course the right of the surety, if he shall come to claim his privilege of substitution, to proceed in due course of law to collect the debt of the principal debtor, or if he relinquish any security he may hold for his debt, or surrenders any funds he may hold applicable to its payment, he, to that extent at least, exonerates the surety. The rule is founded in equal justice. While nothing is required to be done by the creditor for the benefit of the surety, it is also required that nothing shall be done to his injury. The proper inquiry in every case is not what degree of diligence the creditor has exercised in the collection of the debt, or with what degree of negligence he is chargeable, but whether he has by *his direct acts* injured the surety. In the case before Judge McLean, the lien of the judgment and the levy of the execution upon the property of the principal debtor, was a security in the hands of the creditor available for the relief of the surety. To relinquish that security was to injure the surety by the direct act of the creditor. And when the fact is added that the security was relinquished for the purpose of applying the property to the payment of another debt against the principal debtor, less secure, it amounts to a breach of moral duty.

So far as he relies upon adjudged cases, Judge McLean, after first expressing his dissent to the opinion of the supreme court of his own state in the case of *Dixon v. Ewing's Adm'rs* before noticed, confines himself to the cases of *Lenox v. Prout* and *Bay v. Tallmadge*. In respect to the former he says, "it is a case similar in principle and not dissimilar in fact." And in *Bay v. Tallmadge*, he says Chancellor Kent has decided the same principle. But I must be permitted to say that I have entirely misapprehended as well the facts as the principle involved in both those cases if they contain any thing which sustains the decision in *Findlay v. The Bank of the United States*. Whether right or wrong, I think that decision must be regarded as standing unsupported by any other authority either in England or this country.

Since my examination of this question I have met with an

Hubbell v. Carpenter

able and well reasoned opinion upon the same question by Mr. Justice Allen, in *Storms v. Thorn*, (3 Barb. Sup. Court R. 314.) My confidence in the correctness of the conclusions at which I had arrived is not a little strengthened, upon finding that the examination of the question by that learned justice had led him to the same result.

The application of the principles, thus deduced, to the case at bar is obvious. By the arrangement between the plaintiffs and Ellis and McCumber, on the 21st of August, 1845, they abandoned the means in their hands which might have proved available for the indemnity of Carpenter. They did more. They not only relinquished their levy, but they in effect released Ellis from all further obligation to pay that part of their debt for which Carpenter had become liable as endorser. Suppose, after this transaction Carpenter had come to the plaintiffs and paid their debt and claimed his right to be substituted in their place as against Ellis, the principal debtor. What could he have acquired by an assignment from the plaintiffs? They had bound themselves not to collect the debt of Ellis, and of course they could not confer upon another the power of doing what they had bound themselves not to do. Having thus disabled themselves from collecting their debt of the principal debtor, or transferring the right to enforce collection to the surety upon his paying the debt, they must be held to have exonerated the surety also. The bill should therefore be dismissed with costs.

WATSON, J. concurred. PARKER, J. dissented.

SAME TERM. *Before the same Justices.*

BRICE vs. BRICE and others.

R. B. on the 2d of January, 1833, being the owner of a farm of about 130 acres, conveyed the same with the exception of two acres, to his son J. R. B. The consideration expressed in the deed was \$300; and the grant was declared to be subject to the support and maintenance of the grantor and his wife during their lives. On the same day J. R. B. executed to L. a deed of the farm, similar in all respects to the deed executed by R. B. On a bill by R. B. praying that J. R. B. and L. might be decreed to release the farm to the plaintiff, and that the conveyances might be declared fraudulent and void, &c., it appeared from the proofs that at the time of the execution of the deed from the plaintiff to J. R. B. the latter had for several years exercised almost unlimited control over the former, and had acted as his general agent, and transacted most of his business; that the plaintiff had become old and feeble, and in the management of his affairs depended on the aid and counsel of his son, who had thereby acquired great and controlling influence over him; that J. R. B. proposed to the plaintiff that he should convey all his property to himself and L. his brother-in-law, reserving to R. B. and his wife a support; that to induce him to comply with their proposal, J. R. B. and L. referred to his present weakness and infirmities—told him that he had become old and foolish—alluded to the evidence of his imbecility in the fact of his having signed papers which he ought not to have signed, and advised him to place his property in the hands of L. as a trustee, and thereby secure a support for himself and his wife. In consequence of which representations R. B. executed the deed, and J. R. B. and L. became vested with the title to his entire estate, worth from 4 to \$6000 over and above the incumbrances, without having paid any consideration whatever, or incurred any liability, beyond a personal covenant to support the grantor and his wife for life.

Held that R. B. was induced to execute the conveyance by means of an undue influence exercised over his free will by J. R. B. and L.; and that the case was within the principle and policy which govern courts of equity in avoiding deeds obtained under such circumstances.

Held also, that the relation of both child and confidential agent which J. R. B. sustained to the grantor brought the case within the equitable rule that he who bargains in a matter of advantage, with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence.

Held further, that L. was not in a situation to claim protection as a bona fide purchaser; it being sufficient that he received his conveyance infected with the undue influence and imposition of his grantor. That the obligation of restitution followed it into his hands, though he might not be guilty of actual fraud himself. And *held* that the general rule that in cases of fraud the whole transaction will be undone, and all the parties replaced in their former situation,

Brice v. Brice.

would not allow him to avail himself of his own innocence, to protect the property against the person who had been deprived of it by fraud or imposition.

Where a bill is filed to set aside a conveyance, on the ground of undue influence if the facts alleged in the bill are sufficient to justify the inference of undue influence, and the proofs sustain the allegations, relief will not be denied because the plaintiff, in stating his case, has averred that the transaction of which he complains occurred through mistake, or misapprehension, or by fraud and deceit. L. went to R. B., whose son, J. R. B. was in prison under an indictment for perjury, and informed him that he came at the request of his son, and that W. would unite with him, L., in becoming bail for J. R. B. if R. B. would give L. a warranty deed of his farm; assuring him that the deed was only for the appearance of J. R. B. at court, and would be given up if he stood his trial. R. B. accordingly executed an absolute deed to L., with that understanding. No such deed having, in fact, been required by W., and the pretence of its being necessary, to procure bail for J. R. B. being false; *Held*, on a bill filed by R. B. to set aside such deed on the ground of fraud, that the same was improperly obtained, and should be declared void, as between the grantor and grantee.

In order to defend a title on the ground of a bona fide purchase, it must be shown that the purchase was made for a valuable consideration, and without notice of any prior equity.

When a person, other than the vendor, is in possession of land, the purchaser has constructive notice of the rights of the possessor, and takes the land subject to all his equitable claims.

The possession of such third person is sufficient to put the purchaser upon inquiry as to the extent of his rights. And those claiming under the title of such purchaser cannot defend on the ground that he was a bona fide purchaser without notice.

IN EQUITY. This was an appeal by the plaintiff from a decree of the late assistant vice chancellor of the first circuit. The plaintiff, on the second day of January, 1833, was the owner and in possession of a valuable farm in the town of New Scotland in the county of Albany, containing about 130 acres. On that day he conveyed the farm to his son James R. Brice, one of the defendants, "excepting thereout two acres, one granted to Mary Brice and the other to Margaret Brice." The consideration expressed in the deed was \$300, and the grant was declared to be "*subject to the support and maintenance of the said Robert Brice and his wife, during their lives and the life of the survivor of them, and that the grantee, his heirs and assigns shall stand seised subject only as aforesaid, and these presents shall be deemed a covenant therefor.*" At the time of the conveyance the farm was encumbered by a mortgage

Brice v. Brice.

executed by the plaintiff to the New-York Life Insurance and Trust Company to secure the payment of \$1800 and interest from the 12th day of June, 1832; at the same time the deed from the plaintiff to James R. Brice was executed the latter executed to the defendant Sebastian Lewis a deed of the same farm, similar in all respects to the deed executed by the plaintiff. On the 21st of December, 1833, the plaintiff executed another deed whereby for the consideration of \$1000 expressed therein, he conveyed the same farm to the defendant Sebastian Lewis absolutely, with the usual covenants of warranty. On the 12th day of February, 1834, James R. Brice and Sebastian Lewis executed a deed of one hundred acres of the farm to Sebastian Gunsolus, an uncle of the defendant Lewis. The consideration of the deed was \$3000, and the conveyance was made subject to the mortgage for \$1800 to the New-York Life Insurance and Trust Company. On the 16th of April, 1835, Gunsolus conveyed the same 100 acres which had been conveyed to him, to the defendant Charles Van Eps, by a warranty deed. Van Eps went into possession under his deed. James R. Brice was indicted for perjury in December, 1833, and in March, 1834, was convicted and sentenced to the state prison for four years. His sentence expired in March, 1838, when he returned and with the plaintiff took possession of that part of the farm which had not been conveyed to Gunsolus. They still remain in possession. Gunsolus died in 1842.

The bill in this cause was filed in March, 1844. It stated that the plaintiff, at the time of the execution of the deeds from him to James R. Brice and from James R. Brice to Sebastian Lewis, being advanced in years and of delicate and infirm health, under the advice of his family and friends, consented and agreed with James R. Brice and Sebastian Lewis to convey his farm and property to them, or one of them, as a trustee or trustees, to be held by him or them in trust to apply faithfully the rents and profits to the support and maintenance of himself and wife during their lives and the life of the survivor of them, subject to his disposal by will or otherwise; that in pursuance of such agreement the deeds of the 2d of January, 1833, were exe-

Brice v. Brice.

cuted, and at the same time Lewis executed a bond to James R. Brice, conditioned to reconvey the farm to him upon request, which bond had been lost or destroyed; and that when the conveyances and bond were executed, the plaintiff supposed they would operate to create the trust which had been agreed upon by the parties. It was charged that the conveyances were executed through mistake or misapprehension of the parties; or if not, that the conveyance was fraudulently obtained from the plaintiff.

The bill further stated that on the 21st day of December, 1833, James R. Brice had been arrested and was then in prison upon a charge of perjury; and that to indemnify Lewis for becoming his bail, or procuring some other person to become such bail, it was agreed that the plaintiff should execute an absolute deed of the farm to Lewis, which deed should be deposited in the hands of James Wands, 2d, to be delivered to Lewis in case James R. Brice should not appear according to the condition of his recognizance; but if his bail should be saved harmless, then the deed should be returned to the plaintiff; that the deed of the 21st of December, 1833, was executed upon this condition and deposited with Wands. It was charged that although the bail of James R. Brice was not damnified, yet that Wands having died, Lewis fraudulently obtained the deed from his representatives and insisted that it was a valid and absolute conveyance of the farm. It was also stated that the deed to Gunsolus, though absolute in form, was intended only as a security for the amount which Gunsolus should advance in payment of the mortgage of \$1800, to the New-York Life Insurance and Trust Company. It was also charged in the bill, that when the deed was executed by Gunsolus to Van Eps, the latter was apprized of the rights of the plaintiff; and it was stated that Gunsolus, in his will, had directed his executors, in case the plaintiff's claim to the farm conveyed to Van Eps should be established, to refund to Van Eps the amount of the purchase money he had paid.

The bill waived an answer upon oath, and prayed that James R. Brice and Sebastian Lewis might be decreed to release the farm to the plaintiff, and that the several conveyances mentioned

Brice v. Brice.

might be declared fraudulent and void ; and also, that certain accounts might be stated with the executors of Gunsolus, who were made defendants ; and also with Van Eps, in respect to the rents and profits of the farm, and the payments made upon the mortgage to the New-York Life Insurance and Trust Company, and for general relief.

All the defendants, except James R. Brice, answered together. The answer stated that on the 2d of January, 1833, James R. Brice, claiming to be the owner of the farm, agreed to sell it to Lewis for \$3500 ; of which \$300 was to be paid in cash, \$200 in a note, \$750 in a mortgage to the New-York Life Insurance and Trust Company, to be assumed by Lewis, and the balance, being \$2250, was to be paid by discharging debts of James R. Brice to that amount ; that when the deed to Lewis was executed by James R. Brice, he paid the \$300 in cash, gave his note for \$200, which he had subsequently paid, and executed a bond conditioned to pay debts of James R. Brice to the amount of \$2250 ; that when the deed was read to him by J. V. N. Yates, Esq. who prepared the papers to be executed by the parties, he discovered that it contained a covenant for the support of the plaintiff and his wife, and thereupon he refused to accept it, and insisted upon having the bond he had executed, and the note he had given, cancelled, and the money he had paid refunded ; that then it was agreed between him and James R. Brice and the plaintiff, that his bond should be destroyed, and that Lewis should proceed to pay the debts, and when paid the plaintiff should execute to him an absolute conveyance of the farm ; that the deed of the 21st of December, 1833, was executed in performance of this agreement, and not upon the conditions stated in the bill ; that Lewis had paid on account of the farm \$4548,11. It was alleged that after the deed was delivered and had been recorded, Lewis left the deed with Wands, as his agent, for the purpose of selling the farm. It was also stated that the conveyance to Gunsolus was absolute, and made with the knowledge and advice of the plaintiff ; that James R. Brice joined in the execution of the deed to Gunsolus to satisfy him as to the title, and not because either

Brice v. Brice.

he or the plaintiff claimed any interest in the farm; that Gunsolus paid \$3000 for the 100 acres conveyed to him. The answer further stated, that for some time after the execution of the deed by the plaintiff, Lewis did provide for his support, and had always been ready and willing to keep and perform all the terms and conditions of his deed from which he had not been released and discharged.

The bill was taken as confessed by the defendant James R. Brice. A great number of witnesses were examined, but the facts proved by them will be found sufficiently stated in the opinion of the court. The cause having been heard upon pleadings and proofs before the late assistant vice chancellor of the first circuit, a decree was made by him dismissing the bill with costs.

A. Dean & S. H. Hammond, for the plaintiff.

H. G. Wheaton & E. A. Doolittle, for the defendants.

By the Court, HARRIS, P. J. The evidence in this cause shows that at the time the conveyances of the 2d of January, 1833, were executed, the plaintiff was the owner of a farm worth from six to eight thousand dollars, and had a considerable amount of personal property, consisting of stock, farming implements, &c. That the only incumbrances upon his farm were a mortgage which he had a few months previously executed to the New-York Life Insurance and Trust Company for \$1800, and, perhaps, a judgment in favor of Mr. Wheaton for about \$300 for a debt of his son James. That for several years James had exercised almost unlimited control over the plaintiff; that he had acted as his general agent and transacted most of his business; that he was accustomed to follow the suggestions and advice of James with the most implicit confidence. That he had become old and feeble, and in the management of his affairs depended upon the aid and counsel of his son, and that thereby James had acquired great and controlling influence over him; that under these circumstances James

Brice v. Brice.

formed the purpose of obtaining from his father a conveyance of his property; and to effect that purpose he resolved to call in the aid of his friend and brother-in-law, Sebastian Lewis; that without disclosing to his father his purpose he went to Broadalbin and brought Lewis home with him; that immediately upon his return the plaintiff was sent for, and the proposition made to him that he should convey all his property to them, reserving to himself and his wife a support. That to induce him to comply with their proposal they referred to his present weakness and infirmities, told him that he had become old and foolish, alluded to the evidence of his imbecility in the fact of his having signed papers which he ought not to have signed, and thus artfully appealing to his fears, and betraying the child-like confidence he reposed in them, they advised him that it would be better for him to place his property in the hands of Lewis as a trustee, and thereby secure a support for himself and his wife. They found him a fit subject to be operated upon by their arts. He readily surrendered himself and his property into their hands, and on the same day or the next, they found themselves vested with the title to his entire estate, worth from four to six thousand dollars over and above the incumbrances, without having paid one cent of consideration, or incurred any liability, beyond a personal covenant to support the plaintiff and his wife during their respective lives. I am entirely satisfied that when the conveyance of the second of January, 1833, was made, the plaintiff was under the overruling influence of his son and Lewis; that the transaction was theirs, not his; that while he, with unsuspecting simplicity, yielded to their suggestions and counsel, they were treacherously contriving how they might most effectually profit by his misplaced confidence. I cannot bring myself to doubt that the plaintiff was induced to execute the conveyance by means of an undue influence exercised over his free will by his son and Lewis, and that the case is clearly within the principle and policy which govern courts of equity in avoiding deeds obtained under such circumstances. The relation of both child and confidential agent, which James R. Brice sustained to the

Brice v. Brice.

plaintiff seems to me to bring this case most emphatically within what Lord Eldon called that great rule of the court, that "*he who bargains in a matter of advantage with a person placing confidence in him is bound to show that a reasonable use has been made of that confidence ; a rule applying to trustees, attorneys or any one else.*" The plaintiff believed his son and his son's brother-in-law to be his friends ; and believing this, under the consciousness of his own infirmities, he was readily persuaded to do what they advised him would be for his advantage. The language of Justice Woodworth, in delivering the opinion of the court for the correction of errors in *Whelan v. Whelan*, (3 Cowen, 537,) is forcibly appropriate to such a case. "A contract obtained from one party, so much in the power of the other, cannot be sanctioned if confidence has been abused, if there is inadequacy of price, or the inference is plain that advantage has been taken of age and imbecility, and the partiality of a parent has been artfully made use of to strip him of his property and reduce him to a state of dependence and want."

It was urged upon the argument, on behalf of the defendant Lewis, that though James R. Brice may have imposed upon the credulity of his father, the evidence was not sufficient to involve Lewis in the imposition. I think the proof justifies the conclusion that Lewis himself, with a full knowledge of the purpose of James R. Brice, freely lent himself to their accomplishment, and that ultimately he sought to derive to himself the chief benefit of the fraud he had contributed to practice upon the plaintiff. But however this may be, Lewis is not in a situation to claim protection as a bona fide purchaser, and it is enough that he received the conveyance infected with the undue influence and imposition of him from whom he received it. The obligation of restitution follows it into his hands. Though he may not be guilty of actual fraud himself, the general rule, that in cases of fraud "the whole transaction will be undone and all the parties replaced in their former situation," will not allow him to avail himself of his own innocence to pro-

Brice v. Brice.

tect the property against the party who has been deprived of it by fraud or imposition.

But it is insisted that the plaintiff is not entitled to relief upon the ground of undue influence, because it is not properly alleged in the bill. The learned assistant vice chancellor seems to have been of this opinion ; for he says "I conceive the bill as radically defective in charging the fraudulent acts in the alternative, upon the son or Lewis, and in charging it to be a mistake or fraud." If it be true that the bill contains no such substantive allegation, then though the proof might warrant the relief sought, it cannot be granted. For it must appear from the bill, as well as the proof, that the plaintiff is entitled to the relief sought. Not, indeed, that any technical form of words is necessary ; but such a state of facts must be found in the bill as will lead the court, upon an examination of all its allegations, to draw the inference of undue influence. The terms "undue influence," or "fraud," or "mistake," may not be found in the bill, and yet if either of these grounds of relief is substantially involved in the statements of the bill, relief will not be denied, for the want of proper allegations.

Testing the sufficiency of the allegations in the bill by this rule of pleading, I think they will be found to warrant the relief sought. The plaintiff alleges that being advanced in years, and of delicate and infirm health, and with a view and for the purpose of relieving himself, as far as practicable, from the cares, labors, anxieties and responsibilities connected with and growing out of the conducting and carrying on of his farm, and having perfect confidence in his son and Lewis, he consented and agreed with them to make the conveyance ; that the deeds were devised and contrived by Lewis and his son, and drawn under their directions ; that, at the time, he was very infirm and feeble both in mind and in body ; that he had always been a farmer, was illiterate and easily imposed upon ; that he supposed his son and Lewis to be his friends, and trusted implicitly to their instructions and directions ; that he was informed and believed, at the time he executed the conveyance, that such conveyance, together with the deed from James to Lewis, and

Brice v. Brice.

a certain bond executed by Lewis to James, were intended and designed, and had no other effect, than to create the trusts mentioned in the bill, and that these instruments were all essential and necessary to create such trusts; that he relied upon the information given him at the time by James and Lewis, and believed that the effect of the transaction was to create the trusts specified; that the effect of the instruments was not what he designed and intended it should be, but on the contrary they were either executed through the mistake or misapprehension of the parties, or else James R. Brice and Sebastian Lewis procured them to be drawn and executed fraudulently and for the purpose of deceiving the plaintiff and obtaining from him his property by fraud and deceit, and without any other consideration than his support and maintenance.

This brief review of the statements in the bill shows, I think, a state of facts from which it may justly be inferred that the plaintiff, when he executed the conveyance, was entirely in the power and keeping of his son, and that this influence was exerted with a view to the advantage of the son, and in a manner ruinous to the plaintiff. The question then arises whether, when the facts alleged in the bill are sufficient to justify the inference of undue influence, and the proofs sustain the allegations, relief shall be denied because the plaintiff, in stating his case, has averred that the transaction of which he complains occurred through mistake or misapprehension, or by fraud and deceit? I think not. If the whole case made by the bill and sustained by the evidence shows that the plaintiff, through his own misplaced confidence, has been imposed upon, he is entitled to the appropriate relief, notwithstanding he may have erred in designating the ground upon which he claims such relief, as mistake or misapprehension or fraud, when it should have been called *undue influence*. Pleadings in equity have never been construed by rules so technical. It is enough that an examination of the whole bill furnishes statements which make a case for relief, whatever *misnomer* it may contain in relation to the head of equitable jurisdiction to which the case belongs.

The next question in the case relates to the deed of the 21st

Brice v. Brice.

of December, 1833, from the plaintiff to Lewis. This deed, too, I am satisfied was improperly obtained from the plaintiff. The account given of this transaction in the testimony is, that James had been indicted for perjury and was then in jail; that he had found some difficulty in obtaining bail; that Lewis went to the plaintiff and told him that Mr. Wheaton would unite with him in becoming bail for James if he would give to him (Lewis) a warranty deed of his farm free from all the restrictions and reservations contained in the trust deed; that the plaintiff "seemed to feel bad and did not say any thing for a while;" that one Hilton, who accompanied Lewis, then spoke and told him that what Lewis had said was true; that the plaintiff then inquired whether James knew of their coming, and whether *it was his request* that he should give the deed; that Lewis then assured him that he came at the request of his son, and that the deed was only for the appearance of James at court, and would be given up if he stood his trial; that the plaintiff then consented to give the deed, and came to Albany for that purpose. Mr. Wheaton testifies that the plaintiff came to his office and told him he had sold his farm to Lewis, and requested him to draw the deed; that he stated the terms of the sale, though he could not recollect what they were; that he inquired of the plaintiff why he did not endeavor to save his farm by raising money on a mortgage; to which he replied that the farm would have to go, and it might as well go then as at any other time; that he remonstrated with him against disposing of his farm entirely, but he insisted on the deed being drawn, and he accordingly drew the deed, and went with the plaintiff to a commissioner to have it acknowledged; and that the deed was subsequently delivered to Lewis.

I have not deemed it necessary to examine the point urged by the counsel for the plaintiff, that the declarations of the plaintiff to Mr. Wheaton cannot be received in evidence, on the ground that they were privileged communications. I am inclined to think, with the assistant vice chancellor, that they are not within the rule in relation to such communications. But in the view I have taken of the effect of this evidence, the result

Brice v. Brice.

would not be varied by receiving or rejecting this part of Mr. Wheaton's testimony. Strong and unequivocal as is his testimony as to what occurred at the time the deed was drawn, I cannot resist the conclusion, from all the evidence in the case, that whatever may have been said by the plaintiff to Mr. Wheaton, the deed was in fact executed upon an understanding that it should be cancelled in case James should protect his bail by appearing for trial at the proper time. At any rate I am satisfied that this was the understanding of the plaintiff; and if Lewis designed that the deed should have any other effect, he fraudulently concealed such design from the plaintiff. Lewis had gone to the old man with the sad tidings that his son had been indicted and was then in prison. He was told that he could release him from that imprisonment by giving Lewis an absolute warranty deed of his farm. Was this true? Had Mr. Wheaton required such a deed as a condition of his becoming bail for James? There is no allusion to it in Mr. Wheaton's testimony; and I therefore infer that the pretence that such a deed was necessary to procure bail for James, was a *false pretence*, invented by Lewis for the purpose of more effectually consummating his fraudulent designs. When he found that the plaintiff hesitated to surrender his last means of support, he urged the consideration that he had come at the request of his son, and finally assured him that if James stood his trial the deed would be given up. If the plaintiff was made to believe that the release of his son depended upon his giving Lewis "a new warranty deed free from all the restrictions and reservations contained in the former deed," he might also have been made to believe that his purpose to assist his son would be defeated, if he disclosed to Mr. Wheaton the assurance he had received, that the deed should become inoperative if the bail of James should be protected. This may account for the otherwise singular pertinacity with which he insisted, while at Mr. Wheaton's office, upon divesting himself entirely of all interest in his farm. This view of the transaction derives some confirmation from the fact stated by Mr. Wheaton, that no bargain was made, nor was any money paid at his office, nor in-

Brice v. Brice.

deed does it appear that Lewis was at the office of Mr. Wheaton at all with the plaintiff. The fact, too, that it appears that on the same day the deed was given, Mr. Wheaton became bail for James upon the indictment, leads almost irresistibly to the conclusion that there was some connexion between the two transactions.

The subsequent conduct of the parties seems also to sustain the position of the plaintiff, that the deed of the 21st of December was not intended to operate as an absolute conveyance; or at least that it was not so understood by the plaintiff. It appears that a few days after the execution of the deed Lewis advertised the property, both real and personal, for sale. Upon being informed of this, the plaintiff became alarmed, and called upon the overseers of the poor of the town and stated to them that he had executed a deed to Lewis, *supposing it was a deed of trust to be held by him as long as he was security for the appearance of James at court*; and wanted to know if something could not be done to save out of the property enough for his maintenance. They went with the plaintiff to Albany and consulted several lawyers. The result was that a notice was prepared and posted at the principal public places in the town, cautioning all persons against purchasing the property of Lewis, on the ground that his pretended title was fraudulent. This notice was given on the 15th of Jan. 1834, and purported to have been signed by the plaintiff. It is true that afterwards, when Lewis had caused one of the overseers to be arrested for forgery committed in signing the name of the plaintiff to the notice, the plaintiff denied having authorized the use of his name, and stated that the title to the property was in Lewis. This occurred in March, and about the time James was to be tried upon the indictment against him. And I cannot but indulge the suspicion that the same influences which had operated upon the plaintiff's mind to induce him to execute the deed, were employed with similar success to induce him to disclaim his agency in the publication of the notices, and to affirm the conveyance to Lewis. It is in this way alone that I can satisfactorily account for the conduct of the plaintiff.

Brice v. Brice.

I do not propose to examine, in detail, the evidence in relation to the subsequent conduct and declarations of Lewis. It is proved that shortly after the conviction of James, he told Charles Wands that the plaintiff had given him the deed to procure bail for James; that the deed had been placed in the hands of Squire Wands, and now that James was in the state prison, it ought to be given up. The deed was in fact deposited with Squire Wands, and remained there until his death. *Joseph Wands* testifies to a conversation between Lewis and Squire Wands, at which he was present. He thinks it was the winter after James R. Brice went to state prison. He says Squire Wands asked him what should be done with the deed; and expressed the opinion that if James R. Brice lived to come out of prison, it ought to be given up to him; and if not, to his heirs. In the spring of 1835, Lewis told Dr. Lloyd, when speaking of a suit he had brought against him in relation to some oats that had been bid off by him at an auction sale upon the farm, that he had merely acted as the agent of the plaintiff, and that the farm had been conveyed to him so that he might become bail for the appearance of James at court. These declarations, whatever their effect might be, if unsupported by other evidence, are so fully corroborated by all the circumstances attending the transactions to which they relate, that I have no hesitation in saying that the plaintiff has proved substantially the allegations in his bill in respect to the deed of the 21st of December, 1833; and that this deed, as well as those of the second of January, ought to be declared void as between the plaintiff and the defendant Sebastian Lewis.

The next question in the case relates to the deed from James R. Brice and Sebastian Lewis to Sebastian Gunsolus, for one hundred acres of the farm, executed on the 12th day of February, 1834. The plaintiff insists that this deed, though absolute on its face, was in fact intended to be a security for the moneys which Gunsolus might advance in satisfaction of the mortgage upon the farm. On the other hand, the defendants aver that the sale of the one hundred acres to Gunsolus was absolute, and that he paid therefor the full amount of the \$3000, ex-

Brice v. Brice.

pressed in the deed as the consideration of the purchase ; of which sum about \$1975 was applied to the payment of the amount due upon the mortgage, principal, interest, and costs

The answer is silent as to the manner in which the balance of the purchase money, beyond the amount of the mortgage, was paid ; and it is worthy of remark that there is no proof whatever showing any such payment. Mr. Wheaton, in whose office the deed was executed, has no recollection that any thing was paid at the time. It appears that the amount due upon the mortgage was then unknown, and an obligation was executed by Gunsolus, and witnessed by Mr. Wheaton, whereby he agreed to pay the amount due upon the mortgage and to settle the costs which had been made ; but no provision seems to have been made for the payment of any balance which might be due to Lewis after the amount of the mortgage and costs should be ascertained. It also appears that at the time the deed was executed, Gunsolus executed a lease of the same premises to Lewis, for one year, for a rent of \$200, *payable in advance*, which sum is endorsed upon the lease by Gunsolus, as having been paid on the same day, and the receipt is also witnessed by Mr. Wheaton. The fact that no money was paid at the time the papers were executed, and that there was no pretence, at the time, that any part of the purchase money had been previously paid, and that no obligation was taken from Gunsolus to pay any amount beyond the incumbrance upon the farm, taken in connection with the absence of all proof of any payment by Gunsolus, seems to justify the belief that he did not in fact pay any amount, beyond the sum necessary to discharge the incumbrance upon the farm.

But it is not necessary now to inquire what amount was in fact paid by Gunsolus, as the purchase money of the one hundred acres conveyed to him. It is enough, for the present, to say, that he did not by his deed acquire such a title as would entitle him to protection as a bona fide purchaser. There is no principle better established than that to defend a title on the ground of a bona fide purchase, it must be shown that the purchase was made for a valuable consideration, and without

Brice v. Brice.

notice of any prior equity. (*Grimstone v. Carter*, 3 Paige, 421, and cases there cited.) It is equally well settled that when a person, other than the vendor, is in possession of land, the purchaser has constructive notice of the rights of the possessor, and takes the land subject to all his equitable claims. The possession of such third person is sufficient to put the purchaser upon inquiry as to the extent of his rights. (*Gouverneur v. Lynch*, 2 Paige, 300. *Chesterman v. Gardner*, 5 John. Ch. 29.) In *Buck v. Holloway's devisees*, (2 J. J. Marsh. 180,) the court say: "The only sensible rule is, that actual residence upon the land is notice to all the world of every claim which the tenant may legally assert in defence of his possession." It appears from the proof, and is not denied in the answer, that the plaintiff at the time of the execution of the deed to Gunsolus resided upon the farm, and continued to reside there until the fall of the same year, when "*he left the premises and went to reside with Lewis at Broadalbin.*" It follows, then, that even though Gunsolus became the purchaser of the land absolutely, and in his own right, he nevertheless was chargeable with knowledge of the plaintiff's rights; and those claiming under his title cannot defend on the ground that he was a bona fide purchaser for a valuable consideration without notice. And, besides, I think this branch of the defence must fail for want of proof that Gunsolus ever actually paid the purchase money for the land conveyed to him.

The last remark is equally true of the title of Van Eps. The bill alleges that Gunsolus conveyed to him the one hundred acres with covenants of warranty, and charges that at the time he received the deed he was well apprized of the plaintiff's rights. The answer denies that when Van Eps took his deed he knew that the plaintiff claimed any interest in the land, and insists that Van Eps is the owner in fee of the premises conveyed to him, and has a perfect right to do therewith as he chooses; but it is not alleged in the answer that he purchased for a valuable consideration, or that he has ever paid any consideration whatever for the land. Indeed it would seem from the evidence that Van Eps has never claimed that he was en-

Brice v. Brice.

titled to protection as a bona fide purchaser, without notice of the plaintiff's equitable claim ; but that he has rather relied, for indemnity, upon the covenants in his deed.

I am not satisfied, from the evidence in the case, that the defendant Lewis has ever advanced any thing on account of the plaintiff, beyond the amount received by him upon the sale of the plaintiff's personal property. But as there must be a reference in the case, it may be well to direct that in case he shall claim that he has paid for the plaintiff more than he has received, an account may be stated between them.

The decree appealed from must be reversed, and a decree must be entered declaring the deeds of the second of January, 1833, the deed of the 21st of December, 1833, the deed from Lewis to Gunsolus, and the deed from Gunsolus to Van Eps, severally void as against the plaintiff. The decree must also declare that any of the defendants who have paid any incumbrances existing against the farm at the time it was conveyed by the plaintiff, are entitled to a lien upon the farm for the amount of such payments respectively, with interest thereon. The defendants who have had the use or income of the farm must be charged with the value or amount thereof, with interest. If either of the defendants who has made any payments on account of the incumbrances on the farm is also chargeable with any amount for its use or income, he is to be entitled to a lien upon the farm only for the balance of his advances after crediting the amount due from him for the use or income of the farm. The decree must also provide that an account may be stated between the plaintiff and the defendant Lewis ; and if it shall appear that any sum is justly due from the plaintiff to him, he is also to have a lien upon the farm for such amount. Provision should be made in the decree also for stating an account between the defendant Van Eps and the executors of Gunsolus ; and any amount found due to Van Eps, upon such accounting, is to be declared to be a legal charge against the estate of Gunsolus. Upon the payment of any balance found due to Van Eps, which shall be a lien upon the farm, he must surrender the possession of the farm to the

 Brown v. Woodworth.

plaintiff. It must be referred to Mr. Rhoades to state the several accounts between the parties, upon these principles. The decree is also to contain the necessary directions for carrying into effect its provisions. The plaintiff is entitled to costs as against the defendants James R. Brice and Sebastian Lewis; but as between the plaintiff and the other defendants, neither party is to have costs as against the other.

DELAWARE GENERAL TERM, March, 1849. *H. Gray, Mason, and Morehouse, Justices.*

BROWN vs. WOODWORTH and others.

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The writ of nuisance must be brought against the party by whom the nuisance was erected; and if he has transferred the land to another, then he by whom the nuisance was erected and, he to whom it was transferred, must *both* be named as defendants in the writ.

An action of nuisance against the alienee of land, alone, for *keeping up and continuing* a nuisance erected by his grantor, was unknown to the common law, and is not authorized by the revised statutes.

Where the count, in an action of nuisance, alleged that the nuisance was *below* the plaintiff's land, and the proof was that it was *adjoining* and *on* the plaintiff's land; *Held* that the variance was fatal.

A *license*, by the owner of land, to erect a dam which shall flow it, cannot be created and annexed to an estate of inheritance, or freehold, so as to bind a subsequent owner, without deed.

The interest created by such a license is a freehold interest by way of easement, in the land flowed; which can only pass by deed.

THIS suit was commenced by writ of nuisance, and the defendants were summoned to answer *wherefore they kept up and continued a certain dam, to the nuisance of the freehold of the plaintiff*. The declaration alleged that the plaintiff was possessed of a certain piece of land, describing it by metes and bounds, through which a stream of water naturally flowed, and

Brown v. Woodworth.

that the defendants wrongfully, injuriously and unjustly kept up and continued a certain dam on, upon and across said stream below the said lands of the said plaintiff, by means of which his lands were flowed; stating the injuries resulting therefrom. It appeared on the trial of the cause, that Stephen Hill, father of the defendant Hill, was the principal in erecting the dam some 8 or 10 years before. That at that time the witness Ralph I. Gates was the owner of the premises flowed, and assisted in the erection of the dam; that in 1817, he deeded the premises to Palmer, and that he conveyed them to the plaintiff on the 8th day of October following. It appeared that the defendant Hungerford carried on the mill, and that his co-defendants Woodworth and Hill were interested with him. The precise nature of their interest, whether as tenants for years or in fee, did not appear by the bill of exceptions. The dam, instead of being across the stream, below the plaintiff's land, abutted to and was continued upon it some rods by a slight embankment. The defendants moved for a nonsuit upon the following grounds: 1. That there was a variance between the declaration and proof in regard to the location of the dam. 2. That the proceedings were not in a case provided for by the statute, and that Stephen Hill, senior, should have been joined in the proceedings. 3. That the defendants were not liable in this action, the dam having been erected by the consent, license and assistance of Gates, who was then the owner of the premises flowed by the dam; at least without a request to remove the dam before suit brought. The justice trying the cause nonsuited the plaintiff. His rulings upon the several propositions did not appear, nor was either of them distinguished in the bill of exceptions, as the one governing the case.

D. Brown, for the plaintiff.

S. T. Holmes, for the defendants.

By the Court, MOREHOUSE, J. At common law an assize of nuisance lay only against him who levied the nuisance, or

Brown v. Woodworth.

in other words the wrongdoer himself. Upon an alienation of the land wherein the nuisance was set up, the party injured was driven to his *quod permittat prostertere*. This writ was in its nature a writ of right. It lay not at common law for tenant at life, by reason whereof and that there was great delay, the statute of Wm. 2, ch. 25, gave an assize of novel disseisin for the redress of a variety of wrongs. While in use it lay by the heir of the disseisee against the disseisor, or his heir, or his alienee who levied the nuisance, by statute Wm. 2, ch. 24. Long before we were a free people these actions had been turned into actions upon the case, and were out of use in England. They were preserved by legislation, as old remedies, until the revision of the statutes in 1830; and in that revision the writ of nuisance as a common law remedy was retained as theretofore accustomed, subject to the provisions of the revised statutes on that subject. (2 R. S. 332, § 1.) To return to the assize of nuisance. We have seen that it lay only against the wrongdoer. In 13 Edw. 1, "there was not found any writ of assize of nuisance in the register but what supposed that the tenants in the assize *levaverunt*, and this cannot be said when the teneiment is transferred to another, for he did not levy the nuisance, but the other only." The 24th chapter of the acts of parliament of that year provides, that the party grieved shall have a writ as well against the alienee as against him that erected it. It was held that that statute extends only to assize of nuisance against him who did the nuisance and his alienee. (2 Lutw. 1588.) It does not extend to the alienee of the alienee." It seems by the statute that the action shall be brought against him that did the tort and the tertenant after the alienation. (Fitz. Natura Brevium, 124, H. 290, in the note Viner's Ab. Nuisance, 34.) On the 12th of March, 1787, the legislature of this state, in an act for giving further remedy and regulating the process and proceedings in assizes and other actions, enacted the provisions in the act of Ed. 1, above referred to. (Laws of N. Y. vol. 2, 103, J. & V. ed. 1789.) Section 5 of the chapter is as follows: "That in cases of nuisance, the plaintiff shall not go without remedy because the land is trans-

Brown v. Woodworth.

ferred to another; and further, that when the writ is granted against him or her who hath levied or shall levy the nuisance, the writ shall be made as hath been heretofore used, in the following form: A. B. hath complained to us, that C. D. unjustly and without judgment, hath erected (or made or levied) a house (or a wall, sink, pond, or whatever other thing it may be,) to the nuisance of his freehold. And if such things so levied, erected, or made, be aliened from one to another, the writ shall be thus: A. B. hath complained to us that C. D. and E. F. have *erected*." This enactment, in precisely the same words, will be found in the revisions of our laws down to and including the revision of 1813. (*See also 2 R. S. 332, § 3.*) Writs of nuisance were, by statute, returnable and to be determined in the nature of assizes, either at the supreme court, or at the circuit court, in the county where the nuisance happened. The common law remedies which I have referred to, and which were thus secured by statute, had never been resorted to in this state. An action on the case, or a bill in equity, commended by their simplicity and familiarity to the bar and bench, were the only remedies used in cases of private nuisance. The last revision of our statutes yielded to the wishes of the legislature in abolishing all the real actions known to the common law, not enumerated and retained in ch. 5 of the 3d part of that revision. That by writ of nuisance was among the favored, from an impression "that it might be made very useful because it was, and is, a part of the judgment, *that the nuisance be abated*. The proceedings in the old writ were simplified, in the service of the writ, in proceedings on default, and in the mode of trial, dispensing with a view of the nuisance by the jury. The judgment of the ancient law was retained. The spectacle of a sheriff, with his *posse comitatus*, conquering the perverseness of a defendant, who had rather pay his ill-natured neighbor six cents a year consequential damages, with costs, than voluntarily sacrifice thousands in abating a dam, has not yet been exhibited. The revised statute made no change as to parties, and enacts in language not susceptible of misconstruction, that in case of a transfer of the land to another, the party by whom

Brown v. Woodworth.

the nuisance was erected, and he to whom it was transferred, *shall both* be named as defendants in the writ. (2 R. S. 332, § 2.) Assize lies for acts of misfeasance, but for acts of nonfeasance an action on the case lies. It does not lie for a laches of my doing what I ought to do. It can only be brought by the tenant of the freehold, and shall be brought against *tenant of the franktenement*. (*Viner's Ab. Nuisance*.) The writ and the counts in this case concur in complaining of a continuance of the nuisance. It is true, that every continuance of a nuisance, so far as an action for damages is concerned, is held to be a fresh one, and it is upon this assumption, that he who raised a dam, and his alienee continuing it, are allowed to be charged jointly, as having unjustly raised it, and in an action on the case, the plaintiff may declare both ways, for erecting and continuing, or for continuing only, and the latter is sufficient in any case. In the action of assize of nuisance there is no election. The party by whom the nuisance was erected is defendant, and if he has transferred the land to another, then he by whom the nuisance was erected, and he to whom it was transferred, *shall both* be named as defendants in the writ. There is no room for judicial doubt or criticism, as to the sense in which the legislature used the word *shall* in this statute. There is neither precedent nor opinion to be found in the books, from the time of Edward 1 to the present day, countenancing the assumption, that the legislature meant to give a mere discretionary power, and not to impose a positive duty, by the use of the term *shall*, in the statute in question. The remedy is retained as *heretofore accustomed*. I have shown that it did not lie against any but the very wrongdoer himself, who levied or did the nuisance, at common law, and that the statute gave a new writ when the lands were aliened, against the wrongdoer and alienee, upon a complaint, that both had levied or raised the nuisance. Without the statute there is no writ for such a case. Regarding the statute as remedial, I know of no rule of liberality in its construction, which would authorize the court to entirely dispense with the prescribed proceedings for the attainment of the remedy, or warrant its extension to a

 Brown v. Woodworth.

case not expressly provided for. On the contrary, when I reflect upon the irreparable injuries which might be inflicted upon individuals and companies, using the waters of our country as a motive power, if this obsolete remedy should be revived and favored, and consider the ample remedies of the offended party, to abate the nuisance by his own mere act and authority, in some cases, and in all to sue for damages as continuously as its existence occasions any, I think the court should be rigid in exacting a strict compliance with all the requisites of the statute. (1 *Denio*, 436. 1 *Barb. Sup. C. Rep.* 65. *Smith's Com.* 692, § 547.) The plaintiff was properly nonsuited, upon the ground that such a case as his was unknown to the common law, and was not authorized by statute. The variance was between matter of description in the count and the proof. The allegation was, that the dam continued was below the plaintiff's land; the proof was, that it was adjoining and on the plaintiff's land. The tests of the materiality of variances introduced by the code in chap. 6 of tit. 6, and the provisions for amendments, by the party and the court, or the total disregard of them by the latter, have no application to this case. The counsel citing it on the argument had overlooked § 390. By express provision the act was not to affect proceedings provided for by title 4 of chapter 5 of part 3 of the revised statutes. The variance was therefore fatal. (1 *Denio*, 181. 3 *Id.* 356. 2 *Barn. & Ald.* 363. 2 *Barn. & Cress.* 910.)

The general rule as to license is laid down in *Shepherd's Touchstone*, 231. It is, "that license, or liberty, cannot be created and annexed to an estate of inheritance or freehold, without deed." In *Monk v. Buller*, (*Cro. Jac.* 574,) it was held that a license by a commoner must be by deed. (2 *Saund.* 323, 328.) Many cases will be found considered in *Hawkins v. Shippam*, (5 *B. & C.* 221;) *Perry v. Fitzhove*, (8 *Adol. & Ellis*, 575.) The license in this case is claimed, not against the person granting it, if any was granted, but a subsequent owner in fee as running with the land, and binding the inheritance; not by the person to whom it was granted, but by his grantees. It is a claim of an interest in the land, and a free-

Nash v. Russell.

hold interest by way of easement in the lands flowed, which could only pass by deed. (2 Barb. Ch. Rep. 230. 2 R. S. 135, § 6.) In an assize of nuisance the party goes for acts of commission, and the person who committed them would not be entitled to notice to reform the nuisance, before suit brought; for the injured party might abate the nuisance, without notice and without an appeal to a court of justice.

New trial denied.

SAME TERM. *Before the same Justices.*

NASH vs. RUSSELL.

An action cannot be maintained upon a note given by a person to an officer of a benevolent society, for his initiation fee as a member, and for his quarterly dues.

A mere moral obligation, although coupled with an express promise, is not a sufficient consideration to support a note or bill, between the same parties, unless it is founded on a former legal liability.

THE defendant Russell, on the 2d of January, 1847, was initiated as a member of Eagle Tent No. 174 of the Independent Order of Rechabites, in De Ruyter. The initiation fee was five dollars, one of which was paid as proposition money, before his election, and the remaining four, though required by the law to be paid before the ceremony, was not. By the constitution of the order, every member is to contribute to the funds of his tent not less than one dollar per quarter. On the 1st of May, 1847, the four dollars remaining unpaid, and his quarterly contribution, having become due, the secretary drew a note as follows: "\$5.00. On demand, I promise to pay J. D. W. Potter, financial secretary of Eagle Tent No. 174, I. O. R., or bearer five dollars with use from date, value received. De Ruyter,

Nash v. Russell.

May 1st, 1847." Charles Benjamin was, at the time, treasurer of the society. He received the note from the financial secretary, who informed him of the consideration of the sum stated in it, and he presented it to Russell who signed it, and it remained in his possession as treasurer, until his term of office expired, and was then delivered to the plaintiff as his successor, as part of the effects of the society. The plaintiff brought a suit to recover the amount of the note in March, 1848, before a justice of the peace, and obtained a verdict and judgment, which judgment was removed to the Madison county court, and there reversed. The cause came before this court on appeal from the judgment of that court.

A. V. Bentley, for the plaintiff.

Goodwin & Mitchell, for the defendant.

By the Court, MOREHOUSE, J. The avowed object of the association of Rechabites "is mutual benefit in the exercise of *temperance, fortitude and justice* ; receiving sympathy and relief in times of sickness and distress, and in the event of death, the decent observance of the necessary funeral obsequies for the brethren and their wives ; and is based upon and seeks the extension of the principle of total abstinence from all intoxicating drinks." The funds of the society are consecrated to the furtherance of these social, moral and religious objects, and cannot be constitutionally diverted by a primary tent, except a sum not exceeding fifty dollars for the purpose of furnishing a tent room. They are purposes which challenge the favor of the uninitiate, and if accomplished, their effect upon the moral character of the members, and their ministrations at the bed of sickness, the chamber of languishing, and in the house of mourning, seems to me to constitute the highest of moral obligation on the part of the recipient to redeem the pledge of cheerful obedience to the constitution and laws of the order, which he made upon his matriculation. This court, however, cannot treat the question in the cause ethically. It belongs to the department of

Nash v. Russell.

moral philosophy to teach men their duty, and the reasons of it, and to lay down rules for action, and manners in society. Courts of law have power to enforce the observance of *legal* obligations only. Did Russell, then, by any promise express or implied, upon becoming a member of the order, subject himself to a legal obligation to pay the initiation fee, or to contribute to the funds of the tent periodically? If not, did the express promise evidenced by the note change the legal relation of the society and its members? These questions may be briefly answered by bringing them to the test of a few apposite general principles. By legal obligation I mean one inferable by law. If there was an express agreement, on the defendant's part, to pay the initiation fee, it was a promise to the members of the society of which he immediately became one, and jointly interested in its fund; and he could not be sued for the fees, without involving the legal absurdity of suing himself. (*Warren v. Stevens*, 19 *Pick.* 73.) A mere moral obligation, though coupled with an express promise, is not a sufficient consideration to support a bill between the same parties. (*Story on Bills of Exchange*, 201, § 182.) An express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original cause of action, if the obligation, on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision. (*Wenell v. Adney*, 3 *Bos. & Pull.* 247, note a. *Eastwood v. Kenyon*, 11 *Adolph. & Ell.* 438.) The note of the learned reporters, Bosanquet & Puller, contains a collection of most of the older cases on the subject, and vindicates the conclusion arrived at, and which I have quoted as the general rule. It was not insisted, upon the argument, that the original obligation or promise on which the note was founded, could have been enforced at law. The rule is therefore decisive, if the note has not rendered it inapplicable. The tent is an association of individuals subscribing articles of association, which fix the standard of eligibility, the government of the order, its officers, their

Nash v. Russell.

election or appointment, and the duration of their office, their duties respectively, and those of the members. The officers of primary tents are elected or appointed for a period not exceeding six months. It is obvious that such an association cannot have the rights of succession or any other attributes of a corporation. The officer of to-day, to whom a promise is made, if there be any constitutional article adapted to such a case, goes out of office to-morrow. If a right of action vested in him he carries it with him, though he has ceased to be under the control of the society; if he dies, it vests in his personal representatives. It could not have been the intent of the society that a treasurer or secretary holding place by so brief a tenure, should be authorized to sue delinquents for dues and fines, if they could be sued at all, when by the change for which the constitution provides, they would be beyond their control before a suit commenced would, by the ordinary delay in its prosecution, terminate. It is well settled that no persons can take in succession, or maintain suits as successors, except corporations or their officers, or persons specially authorized by law. The promise in this case was made to the financial secretary in his natural capacity, or to the society. If the former, the note shows upon its face the use to which the moneys are to be appropriated when recovered. It was held by the treasurer until he went out of office, was handed to his successor, and he commenced a suit upon it. What changes have taken place since, in this necessarily shifting and mutable association, I am of course ignorant. The secretary to whom the note was made payable advanced no money, incurred no expense or legal obligation, to pay Russell's indebtedness to the tent, and there was therefore no legal consideration to support the promise as a new one. There has been no actual negotiation of the note. The articles of association provide for the trial of charges preferred against a brother for a violation of any of the principles of the order or offence against its laws, involving fine, reprimand, suspension or expulsion. The ends of the society will be best promoted by pledges and agreements to be carried into effect as honorary engagements, and not enforced in courts of law; and

McDonald v. Edgerton.

if it was practicable to support this action, I should, as a question of policy, be strongly inclined against it as prospectively destructive of the brotherly love, and kindness, and beneficence of which they now furnish an example in a high degree praiseworthy. Upon the principles which govern courts in relation to other contracts, an action cannot be maintained on this instrument, and the judgment of the county court must be affirmed.

SAME TERM. *Before the same Justices.*

McDONALD vs. EDGERTON.

Where there is a conflict of evidence, upon a trial in a justice's court, the verdict of the jury, so far as questions of fact are concerned, is conclusive, and cannot be reviewed, on writ of error, however much the verdict may be against the weight of evidence.

And where the facts which the evidence upon one side tends to establish would entitle the party to a judgment, if found in his favor, the judgment is conclusive, however clearly the jury may have found against the weight of the evidence.

Purchasing liquor, at an inn, is sufficient to constitute the purchaser a guest.

If a person, after becoming a guest at an inn, goes away for a brief period, leaving his property, intending to return, he is to be considered as still continuing a guest; and if his property is lost during his absence, the inn-keeper is liable.

It is not necessary that goods should be placed in the special keeping of an inn-keeper in order to make him liable in case of loss. If the owner is a guest, and his goods are within the inn, that is sufficient to charge the inn-keeper.

ERROR to the Delaware common pleas. McDonald sued Edgerton in a justice's court to recover the value of an over-coat. The defendant was an inn-keeper at Delhi, Delaware county, and the plaintiff proved by John Follett, that in 1844, he stopped at defendant's inn on general training day, about seven o'clock in the morning; soon after the plaintiff came and took off his over-coat; that the plaintiff gave the over-coat to the bar-keeper; that the plaintiff treated the witness and four others

McDonald v. Edgerton.

at the bar, and paid for the liquor. The witness knew nothing more about the over-coat; he heard the plaintiff say that evening that he had lost it. On his cross-examination the witness said he thought the plaintiff gave his over-coat to the bar-keeper, Mr. Woodworth. The defendant's counsel then pointed out Mr. Woodworth to the witness and asked him if Woodworth was the man the plaintiff gave his over-coat to? The witness replied "he could not be positive, but thought he was; it was his impression that Woodworth was the man the plaintiff gave his over-coat to." The plaintiff then called William W. Woodworth, who testified that he was Edgerton's bar keeper at the time in question; that the plaintiff came to him the evening of general training day and said he had lost his over-coat, that the over-coat was left there; the witness helped him look for it but could not find it; and witness did not know that the over-coat was ever found; that the plaintiff did not deliver to him an over-coat on the day in question; that witness was not tending bar that day; and took no over-coat from any person; that the plaintiff told the witness that he, the plaintiff, hung up the over-coat behind the front door and took witness and showed him the place where he hung it up. The plaintiff then proved by another witness that the plaintiff took the great coat from home, on that day, and did not bring it back; and that it was worth \$8 or \$10. The jury found a verdict for the plaintiff, for ten dollars, and the justice rendered judgment in his favor for ten dollars damages and four dollars costs of suit. The defendant removed the cause into the court of common pleas, and that court reversed the judgment of the justice; and the plaintiff brought a writ of error.

S. Monson, for the plaintiff.

Gordon & Edgerton, for the defendant.

By the Court, MASON, J. There is some conflict in the evidence in this case. The witness John Follett testified that the plaintiff came into the defendant's tavern in Delhi, and took off his over-coat and gave it to the bar-keeper, and he thinks it

McDonald v. Edgerton.

was Woodworth he gave it to; and that plaintiff then treated three or four persons at the bar, and he thinks Woodworth helped them to the liquor; while Woodworth testified that the plaintiff did not give him the over-coat; that on the contrary, the plaintiff told him that he himself hung it up behind the front door and took him and showed him where he hung it. It is well settled, by a long series of adjudications, both in this court and in the court of dernier resort in this state, that where there is a conflict of evidence upon a trial in a justice's court, so far as all questions of fact are concerned, the verdict of the jury in the justice's court is conclusive and cannot be reviewed elsewhere, however much the verdict may be against the weight of evidence. (12 *John.* 455. 1 *Cowen*, 251. 15 *Wend.* 492. 18 *Id.* 141. 21 *Id.* 305, 307. 1 *Hill*, 61. 3 *Id.* 75.) And where the facts which the evidence upon one side tends to establish would entitle the party to a judgment, if found in his favor, the judgment is conclusive, however clearly the jury may have found against the weight of the evidence. (*See cases above cited.*) But it is contended by the counsel for the plaintiff in error, that taking the strongest view which the evidence tends to establish, the case does not show any legal liability in the defendant to pay for the coat in question. It becomes necessary therefore to consider the case in this aspect; for this is the only view of the case which we are permitted to consider, under the adjudications, as we have already seen. It is insisted that the proof does not show that the plaintiff was a guest of the defendant. The answer to this argument is that the jury have found the fact that he was a guest, and the question therefore cannot be considered in this court, inasmuch as there was evidence from which the jury might have found the fact. The purchasing of the liquor was enough to constitute the plaintiff a guest. In the case of *Bennett v. Mellor*, (5 *T. R.* 273,) the plaintiff's servant had taken some goods to market at Manchester, and not being able to dispose of them went with them to the defendant's inn and asked the defendant's wife if he could leave the goods there till the following week, and she said he could not, for they were full of parcels. The

McDonald v. Edgerton.

plaintiff's servant then sat down in the inn, had some liquor, and put the goods on the floor immediately behind him, and when he got up, after sitting there a little while, the goods were missing. There was a verdict for the plaintiff for the value of the goods ; and on a motion for a new trial, the king's bench sustained the verdict, deciding that the plaintiff's servant was to be deemed a guest of the defendant. This case is considered, and the principle of the decision adopted, in 2 *Kent's Com.* 593. The case is also cited with approbation by the supreme court of this state, in *Clute v. Wiggins*, (14 *John.* 175.)

But it was said that it does not appear that the coat in question was lost before the plaintiff departed out of the house, and that therefore he is not to be considered as a guest at the time the loss occurred ; and consequently the defendant was not liable. There are two answers to this objection ; the one is the jury have found the fact, upon the evidence in the case, that he was a guest. The other is that it is fairly to be inferred from the evidence in the case that the plaintiff lost his coat before he started to leave the town to go home, and if he was only out to see the town or to view the training, intending to return to the defendant's before he left for home, and get his coat, then I think he was still to be considered as a guest of the defendant. It has been expressly adjudged that if the guest goes out to view the town for a while, intending to return, the inn-keeper is liable for his goods lost in his absence. (2 *Croke's R.* 189.) And so if he goes out and says he will return at night. (1 *Comyn's Dig.* 421, 413.) Justice Bronson, in the case of *Grinnell v. Cook*, (3 *Hill's R.* 490,) affirmed this doctrine in the following language : " Now when a man, after he has actually become a guest and delivered his property to the host, goes away for a brief period, leaving his goods behind him, the law is chargeable with no absurdity in considering him as still continuing a guest, so far as relates to the rights and liabilities of the parties." It is a familiar principle of law that it is not necessary that the goods should have been placed in the special keeping of the inn-keeper, in order to make him li-

McDonald v. Edgerton.

able. If he is a guest, and his goods are within the inn, that is sufficient to charge him. (*Bennett v. Mellor*, 5 T. R. 273, 2 Kent's Com. 593, 594.) The learned commentator upon bailments describes the liability in the following language: "A delivery of the goods into the custody of the inn-keeper is not necessary to charge him with them; for although the guest doth not deliver them or acquaint the inn-keeper with them, still the latter is bound to pay for them if they are stolen or carried away; even though the person who stole them or carried them away is unknown." (*Story on Bailments*, § 479, p. 373.) If the goods are only placed *infra hospitium* that is enough.

It is not necessary, where the goods are proved to be lost, to prove negligence in the inn-keeper, to make him liable for the loss. (*Calye's case*, 8 Co. 32. *Bennett v. Mellor*, 5 T. R. 273. *Clute v. Wiggins*, 14 John. 177. 2 Kent's Com. 594, 3d ed.) There is nothing in the point that the plaintiff should have proved a demand. Where the goods are lost, no demand is necessary, nor where the bailee admits they are lost: this is enough. (1 John. Cases, 406.) But the jury must have found there was a sufficient demand. Again; the justice has not stated in his return that he has returned all the evidence given before him on the trial; and however much we might be inclined to presume in favor of official duty in the justice, we are not at liberty to do so in such a case, after what the court of dernier resort in this state have recently decided. They have held that if the return of the justice does not state that it contains all the evidence, they will presume that there is enough kept back to sustain the judgment. I am therefore of opinion, in the first place, that the common pleas erred in reversing the judgment of the justice, upon the evidence in the case; and secondly, that as the return does not state that all the evidence is returned, we are compelled to infer that there is enough kept back to sustain his judgment. The judgment of the common pleas must be reversed and that of the justice affirmed.

Judgment reversed.

SARATOGA GENERAL TERM, March, 1849. *Paige, Willard,
and Hand, Justices.*

NEILSON vs. NEILSON.

One defendant in a judgment may become the purchaser, at a sheriff's sale, of the real estate of his co-defendant.

When the property of one judgment debtor is taken and sold to satisfy the judgment, such debtor has a remedy against his co-debtors for contribution.

In an action of ejectment, brought by a redeeming creditor, after a sale by the sheriff of real property, under an execution, the plaintiff is not bound to prove by extrinsic evidence, that the judgment debtor had no goods or chattels whereof the debt could be made.

Proof of the judgment, execution and sale, by the usual documentary evidence, followed up by the deed, is all that is required.

It seems the purchaser is not affected by the sheriff's return of the writ, or his failure to return it.

The remedy of the judgment debtor is against the sheriff if he sells real estate before personal property. The disregard by the sheriff of his duty in this respect cannot be used as a defence to an ejectment for the premises sold.

If a judgment is *satisfied* before sale, even a bona fide purchaser derives no title from the sale.

The sheriff may sell under an execution against several defendants who are tenants in common of the premises bound by the judgment, the right and title of all the defendants together; unless some one claiming to be the owner of some portion of the estate, or claiming to be entitled by law to redeem any portion, shall require such portion to be exposed for sale separately; in which latter case it must be sold separately.

Where the sheriff sells the right and title of several defendants to certain premises, and a mortgage creditor of one of the defendants redeems the right and title of such defendant, the deed of the sheriff to such redeeming creditor conveys only the right and title of the defendant which is thus redeemed.

EJECTMENT, tried at the Saratoga circuit, in June, 1848, before Justice HAND, when a verdict was taken for the plaintiff, subject to the opinion of the court, on a case. The facts appearing in evidence, and the points raised upon the trial, are sufficiently detailed in the opinion of the court.

W. A. Beach & A. Bockes, for the plaintiff.

J. Ellsworth, for the defendant.

Neilson v. Neilson.

By the Court, WILLARD, J. The plaintiff claimed title to the premises in question by virtue of a deed from the sheriff of the county of Saratoga, bearing date February 15, 1844, given to him as a mortgage and judgment creditor of Henry Neilson, redeeming the said premises. From the recitals in the deed and certificate of sale, the truth of which was established on the trial, it appeared that the sheriff, on the 12th of November, 1842, by virtue of two writs of fieri facias, issued out of the supreme court, against the property of Henry Neilson, (the now defendant,) Israel Post, jun., Abraham Post and Benjamin Badgley, sold the right and title of the defendants therein to the premises in question to Benjamin Badgley for \$940, that being the highest sum bid for the same. It was shown that at the time of the docketing of the judgments under which those executions issued, and down to the day of trial, Henry Neilson was in the actual possession of the premises sold, occupying the same as one entire farm, and of the principal part of which, described in the case by metes and bounds, he was seised in fee, under a title derived from the last will and testament of his deceased father. From the record of judgment in both causes, it appeared that the judgment was in each cause obtained upon a joint promissory note, signed by all the defendants therein. The defendant's counsel objected to the certificate of sale and sheriff's deed, among other things, upon the ground that Badgley being a co-debtor with the defendant Neilson, could not become a purchaser of the real estate of Neilson under an execution against himself, Neilson, and the other parties to the suit; that his payment to the sheriff was an extinguishment of the judgment and not a purchase. The learned judge reserved this question, and it forms the first point to be considered in the cause.

It has been decided that at law the payment by one of several joint debtors, to the creditor, operates as an extinguishment of the judgment; and that the assignment of the judgment by the owner thereof to one of several defendants produces the same result. (*Ontario Bank v. Walker*, 1 Hill, 652. *The Bank of Salina v. Abbot and others*, 3 Denio, 181.) But it is

Neilson v. Neilson.

believed that this principle is inapplicable to the present case. Here was no assignment of the judgment by the creditor, nor payment by one of several defendants, in the legal sense of that term. If the payment by Badgley of his bid to the sheriff extinguished the judgment, and thus rendered the sale invalid, no sale by the sheriff can ever be upheld when the bid equals the amount of the judgment and is paid. The payment by any purchaser, at a sheriff's sale, who has bid to the amount of the judgment, operates as a discharge of the judgment. But it must be observed that the sale precedes the payment, and is the consideration for it. The power of the judgment, when it has thus performed its office, is spent. The creditor has thus acquired the fruits of it in cash, and the purchaser an equivalent in the property conveyed to him by the sheriff.

The argument of the defendant's counsel, that Badgley paid his own debt and with the same funds acquired Neilson's farm, is plausible. It is, however, fallacious, because it omits one element in the premises essential to a correct judgment of the transaction. It suppresses the fact, that if Neilson's property is taken to pay the whole judgment his co-debtors are liable to him for contribution. Badgley, it is conceived, is in no better condition by bidding off the farm of Neilson than if it were bid off by a stranger. In either case he is bound to reimburse Neilson, his (Badgley's) full share of the judgment. While therefore, with the same funds in a popular sense, he paid the judgment and acquired Neilson's farm, he at the same time incurred an obligation to Neilson to contribute his just proportion of the amount paid by the property sold. The interest of Badgley was that Neilson's farm should sell for the highest possible price. Whatever it failed to pay remained a charge upon Badgley and his co-debtors. He had no motive for sacrificing the farm. If it was sold for less than its value Neilson, or his creditors, could redeem. If it sold for more than the judgment the surplus belonged to Neilson or his creditors. We think there is no legal objection to one defendant in a judgment

Neilson v. Neilson.

becoming the purchaser, at a sheriff's sale, of the real estate of his co-defendants.

A variety of other questions of a subordinate character, were raised upon the trial, which it is expedient to notice. *First*, the defendant's counsel objected to the reading of the certificate of sale, until proof should be given of the want of goods and chattels of the different defendants to satisfy the judgment. The objection was overruled by the judge, who decided that evidence of the judgment and execution was sufficient to let in the proof of the certificate. The 24th section of the statute, (2 R. S. 367,) gives the form of an execution against the defendant's property, and requires the sheriff, if sufficient goods and chattels cannot be found, that then he cause the amount of such judgment to be made of the real estate of the person against whom such judgment was rendered, &c. If the sheriff sells real estate without first searching for and selling the goods and chattels of the defendants, the remedy of the latter is against the sheriff. (*See Evans v. Parker*, 20 Wend. 622.) The question whether the sheriff has violated his duty in this respect cannot be raised in a collateral action brought by a purchaser or redeeming creditor to recover the land sold. Nor will the court, in general, entertain a motion to set aside a return of nulla bona, but will leave parties to their action against the sheriff. (*Id. supra.*) The sheriff's return is not essential to the title of the purchaser. The title is not created by, nor dependant on the return, but is derived from the previous sale made by the sheriff by virtue of his writ. It is sufficient for the purchaser that the sheriff had competent authority, and sold and executed a deed to him. (*Per Lansing, Ch. J. in Jackson v. Sternburg*, 1 John. Cas. 155.) It will not be affected by an incorrect return on the writ, nor by an omission to return it altogether. It would essentially impair the confidence in sales of real estate by the sheriff, if their validity might be affected by irregularities in the judgment or execution, or the omission of the sheriff to make a proper return. (*Carman v. Roosevelt*, 13 John. 97. *McCrea v. Bartlett*, 8 Id. 361. *Jackson v. Cadwell*, 1 Cowen, 622. *Woodcock v. Bennett*, 1 Id. 711. *Jack-*

Neilson v. Neilson.

son v. *Walker*, 4 *Wend.* 462.) If, indeed, the judgment be *satisfied before* the sale, even a bona fide purchaser would acquire no title. (*Wood v. Colvin*, 2 *Hill*, 566.) In such case, the sheriff has no subsisting power to sell, and of this the purchaser must take notice at his peril. (See *Jackson v. Moon*, 18 *John.* 441; *Jackson v. Anderson*, 4 *Wend.* 474.) There was, therefore, no error in the decision of the learned judge, in overruling this objection to the certificate and deed.

Second. The defendant's counsel objected to the sheriff's certificate of sale, "inasmuch as it appeared that different parcels of the farm, known as such, had been sold together, wherein the defendants in the execution had different estates, and in some of the separate parcels all of the said defendants had different estates, and in other parcels some of the defendants had no interest. That such blending in one general sale, of the various estates in those parcels, rendered the sale to Badgley a nullity." The judge overruled the objection. From the case, it appears that the whole premises described in the declaration, and which are embraced in the deed of the sheriff to the plaintiff, lie in the form of a parallelogram and embrace one hundred acres. They were occupied by the defendant's father for many years, and at the time of his death, as one farm, and were so occupied by the defendant when the judgments under which the sale took place were docketed, and at the time of the sale and at the commencement of this suit, and for many years before. Of this one hundred acre farm, sixty-two and a half acres, in severalty, belonged to the defendant in fee. Thirty-two and a half acres had been set off to the widow of the defendant's father for dower, but the defendant had purchased and was in possession of her life estate. Of the remainder expectant on the determination of the estate in dower, one-fifth belonged to the defendant in fee, and the undivided one thirty-fifth part belonged to each of the other defendants in the judgment in fee, in right of his wife. Of the remaining five acres the one-fifth belonged to the defendant in fee, and the undivided one thirty-fifth part belonged to each of the other defendants in the judgment, for life, in right of his wife.

Neilson v. Neilson.

From the map annexed to the case, it appears that the sixty-two and a half acres belonging to the defendant in fee, and the dower right, and the remaining five acres, are each described by definite boundaries, but there is no evidence that they were ever occupied otherwise than as constituting one farm. The sheriff's deed recites that for want of goods and chattels, &c. he sold "all the right, title and interest which the said defendants Henry Neilson, Israel Post, jr., Abraham Post and Benjamin Badgley, or either of them, had on, &c. or at any time since, &c. of, in and to the premises mentioned in the deed, which are the same as those described in the declaration, to Benjamin Badgley, for nine hundred and forty dollars." It then describes the certificate given on the sale, and proceeds to state the redemption by the plaintiff under a bond and mortgage covering the same premises except an undivided fifth part and an undivided thirty-fifth part of about thirty acres, executed by the defendant Henry Neilson and wife, and sundry judgments against Henry Neilson. It then "grants, bargains and sells to the said George W. Neilson, and to his heirs and assigns forever, all the estate, right, title and interest which the said defendant Henry Neilson had on, &c. in the premises in question, describing them as in the declaration.

The statute of executions against property, (2 R. S. 369, § 39,) requires that when real estate offered for sale by virtue of any execution, shall consist of several known lots, tracts or parcels, such lots, tract or parcels shall be separately exposed for sale; and if any person claiming to be the owner of any portion of such estate, or of such lots, tracts or parcels, or either of them, or claiming to be entitled by law to redeem any such portion, shall require such portion to be exposed for sale separately, it shall be the duty of the sheriff to expose the same for sale accordingly." In the present case there was in fact but one lot within the meaning of the section. It was then, and had been for years, so occupied by Henry Neilson. And no person required any portion of the estate to be sold separately. Nor is there the slightest reason to believe that the premises would have brought more if the interest of each defendant had been

Neilson v. Neilson.

separately sold. The objection goes the length of requiring the sheriff, on an execution against all the tenants in common of a farm, to sell separately the interest of each. This, it is conceded, he is bound to do if required by the owner or a party entitled to redeem. But if no objection is interposed, it is believed the sheriff may sell, at once, the interest of all the defendants in the execution in the real estate advertised for sale. The forty-eighth section obviously contemplates that the undivided shares of joint tenants and tenants in common may be thus sold together, and it points out the mode in which each separate joint tenant or tenant in common, or his creditor having a lien, may redeem his undivided share. There are some conveniences, no doubt, attending a sale of undivided shares separately. It facilitates redemptions; and the thirty-eighth section has properly made it the duty of the sheriff so to sell, when required to do so by the owner or party entitled to redeem. Subsequent sections have regulated the right of redemption. (§§ 51 to 55 inclusive.) A creditor having a lien by judgment or decree on a specific portion of any lot sold, may acquire the title of the purchaser to the whole lot. And in like manner a creditor having a judgment or decree which is a lien upon an undivided share or interest in any real estate sold under execution, may acquire the title of the original purchaser to such share or interest, by paying such part of the whole purchase money of such real estate, as shall be in a just proportion to the amount of such share or interest. And by the act of 1836, ch. 525, § 1, a creditor by mortgage on real estate, his assignee or representatives, when the mortgaged premises or any part thereof have been sold on execution, has the same right to acquire the interest of the purchaser of such real estate so mortgaged or sold, as is given to a judgment creditor.

It is objected that the sheriff sold the right and title of all the defendants in the judgments, and the sheriff has conveyed to the plaintiff only the right and title of Henry Neilson. The answer is, the plaintiff redeemed as a creditor by mortgage, of Henry Neilson alone. He could, therefore, acquire no greater estate than that which had belonged to Neilson, and was

Neilson v. Neilson.

bound by the execution, under which Badgley purchased. If that was an undivided share, the plaintiff has acquired it. If it was an estate in severalty as to the whole, or any portion of the premises, he has acquired that, also. The deed to the plaintiff, therefore, does not affect the estate which either Badgley, Israel Post or Abraham Post had in the premises, before the sale. Such estate, if it has not been redeemed, is still in Badgley. Henry Neilson cannot object to this. It is enough for him that the deed conveys the whole of *his* estate in the premises. That entitles the plaintiff to recover from *him* the whole premises of which he was in possession. Nor is it material that the mortgage does not cover the whole lot. Under the 53d section the plaintiff was entitled to a deed from the sheriff, conveying to him the title of the purchaser to the *whole* lot, as against Henry Neilson, in the same manner as if the lien of the mortgage extended to the whole lot. He paid the whole sum bid by Badgley, together with the interest. If he paid too much, the plaintiff alone is the one to complain. It is enough that the deed conveys all Henry Neilson's estate. That entitles the plaintiff to a verdict for the whole premises, which verdict should describe the title of Henry Neilson and the premises recovered, according to the fact. It will be time enough to adjust the rights of Badgley, Israel Post and Abraham Post, when they are brought before the court by an appropriate action.

Third. The objection to the plaintiff's right to redeem under the mortgage was, 1st, that the affidavit of the amount due was made by the plaintiff, as assignee, and did not state how he knew the amount justly due; and 2d, that the mortgage was given by Henry Neilson, one of the defendants in the judgment, and could not authorize a redemption of estates sold and belonging to the other defendants. The first objection is answered by the second section of the act of 1836, ch. 525. The affidavit is in exact conformity to that section. And the second objection, by the first section of the same act, in connection with the 53d section. (2 R. S. 372.) The mortgage was clearly a lien on a portion of the lot sold, and that entitled the owner of it to redeem the whole lot sold, of which Henry Neil-

Rockwell v. Perine.

son was in possession. The deed was therefore rightly given to the plaintiff, conveying all the estate &c. of Henry Neilson.

Fourth. The objection that, under a declaration claiming to recover the whole lot in fee, the plaintiff is not entitled to a verdict for an estate in fee in one part and a less estate in another part, is substantially answered by the elaborate opinion of Justice Cady in *Vrooman v. Weed*, (2 Barb. Sup. Court Rep. 330.)

Fifth. The offer to prove that the mortgage under which the plaintiff redeemed was given without consideration was correctly overruled. The defendant himself never attempted to redeem. It was not competent for him to contradict the mortgage by parol evidence. The other objections raised on the trial, and not embraced in some of the points already considered, were not well taken. There must be judgment for the plaintiff on the verdict. And the verdict must specify the estate proved and established on the trial, according the 7th subdivision of section 30, 2 R. S. 307.

Judgment for the plaintiff.

SAME TERM. *Before the same Justices.*

ROCKWELL vs. PERINE.

Where a plaintiff, in an action in a justice's court, claimed, in his declaration, damages to the amount of "one hundred dollars and over," but took judgment for less than \$100; *Held*, that there was no error: the words "and over" being void for uncertainty.

DEBT on a judgment recovered before a justice of the peace, in an action of covenant, for \$60 damages and \$5 costs.

H. R. Wing, for the plaintiff.

A. T. Willson, for the defendant.

Rockwell v. Perina.

By the Court, WILLARD, J. It appears that the declaration before the justice was in covenant, on a contract to build a house, in which, after assigning several breaches, the plaintiff concluded by claiming "damages one hundred dollars and over." The defendant before the justice appeared in said action and pleaded *non est factum*, and also denied the breaches. The cause was tried on the merits, and judgment was rendered for the plaintiff, for \$60 damages and \$5 costs. The defendant has demurred to the declaration, assigning for cause, that as the plaintiff before the justice claimed damages for one hundred dollars *and over*, the justice had no jurisdiction to try the cause; and that of course the judgment is void. If the plaintiff before the justice had claimed one hundred and fifty dollars, or *any* other sum, more than one hundred, the justice would have been ousted of jurisdiction, according to the decisions in *Yager v. Hannah*, (6 Hill, 631;) *Bowditch v. Salisbury*, (9 John. 366.) In the latter case it was held that although the notes declared on exceeded a justice's jurisdiction, yet as the plaintiff only claimed damages to the amount of his jurisdiction, it was well enough.

This case is different from the foregoing, and all the cases which have been cited. In my judgment the declaration only claims damages to one hundred dollars. The words "*and over*," are void for uncertainty. They express nothing. They would not be sufficient to authorize a plaintiff, in this court, to take a judgment on a verdict beyond the sum expressed; and the plaintiff would be required to remit the excess if the verdict was for more. They have no greater effect than if an "&c." were added to the declaration. When taken all together the pleading amounts to this; that the plaintiff has sustained damages to the amount of over one hundred dollars, but nevertheless is willing to take judgment for one hundred dollars. This is clearly good, within *Salisbury v. Bowditch*, (9 John. 366,) which is in point.

I think the plaintiff is entitled to judgment on the demurrer, with leave to the defendant to plead on payment of costs.

Mosher v. The People.

SAME TERM. *Before the same Justices.*

MOSHER vs. THE PEOPLE, *ex rel.* Child.

An affidavit made by a creditor, or an indifferent person, for the purpose of obtaining a warrant for the arrest of a debtor, under the 3d section of the act to abolish imprisonment for debt, &c. must contain a positive averment as to the truth of the facts and circumstances which are relied upon as the foundation of the warrant.

The facts and circumstances must be of such a character as to tend to prove the ground on which the process is asked for.

The intent of the debtor may be stated on the belief of the creditor, or his agent, when the requisite facts and circumstances are positively proved.

It seems that in forming his judgment that the allegations of the applicant are established, and that the debtor has done, or is about to do, any of the acts specified in the 4th section of the act, some weight is due to the omission of the debtor to answer or explain the facts and circumstances relied upon, if they appear to have been within his personal knowledge.

THIS was a certiorari issued under the act to abolish imprisonment for debt, and to punish fraudulent debtors, passed April 26, 1831, to reverse an order made by T. J. Marvin, Esq. then first judge of Saratoga county courts, committing the plaintiff in error to jail, for fraudulently concealing property. The proceedings were instituted under the said act on the 28th of June, 1847. The affidavit of the attorney of the judgment creditor, after setting forth a judgment for above fifty dollars against Mosher, for which he could not be arrested or imprisoned, stated that on the 5th of June, 1847, an execution was issued upon the judgment against Mosher to Zimri Lawrence, a deputy sheriff of said county; that no part of said judgment has been paid, "and that *as he is informed and believes*, the said Mosher has property and rights in action which he fraudulently conceals and unjustly refuses to apply to the payment of said judgment, as will appear by the affidavit of said Lawrence annexed;" and that the demand on which the judgment was obtained, accrued previous to the year 1842. The affida-

Mosher v. The People.

vit of Lawrence states that on the 23d of June, 1847, he called on Mosher at his residence in Stillwater, with the execution aforesaid, informed him of the execution, and asked if he had any property to apply on it, or which would be liable thereto. That Mosher replied that he should not inform the deponent. The deponent found on the farm on which said Mosher resided a span of three years old colts, driven by Mosher the preceding winter, a one horse wagon, and a single harness. Mosher, though requested, refused to inform the officer who was the owner of the said property, and directed a young man of whom the officer made inquiries, to make no communications on the subject. That Mosher is a farmer, and during the last year occupied a farm of his father-in-law in Saratoga, and there resided in the house of one Baker, hiring rooms therein, and is not engaged in any regular business; that the deponent was informed that one of the colts belonged to Baker. Mosher expressly refused to turn out property on the execution, but did not deny that he had property, but declared he would not pay that execution. On the 26th of June, the officer again saw Mosher, who asked the officer when he was coming down, to which the latter replied, "some time in the present week." Mosher then said the deponent would look well selling other people's property. The judge issued his warrant on the 28th of June, on which Mosher was arrested and brought before him in pursuance of the 6th section of the act, but he declined controverting the facts and circumstances on which the warrant was issued. The judge thereupon decided that the complaint was substantiated, and that the said Joseph Mosher had property and rights in action which he fraudulently concealed and unjustly refused to apply to the payment of the said judgment. He thereupon issued his warrant of commitment, under the 9th section of the act.

W. L. Avery, for the plaintiff in error.

W. A. Beach, for the defendants in error.

Mosher v. The People.

By the Court, WILLARD, J. The plaintiff in error insists that sufficient facts are not stated in the affidavits of Beach and Lawrence to confer jurisdiction upon the judge, as it is only alleged on *information and belief* that Mosher had property and rights in action fraudulently concealed, &c.

In the case of *Collamer v. Elmore*, decided by this court in May last, all the cases on the subject of warrants issued under the act to abolish imprisonment for debt and under our attachment laws were examined. In that case, the question arose in an action of assault and battery and false imprisonment, in which the defendant sought to defend himself under a warrant issued by a supreme court commissioner, under the same sections of the act by virtue of which the present warrant was issued; and a majority of the court held the warrant no protection, because the applicant merely swore that the original defendant had certain credits, as he was *informed and believed*, which he unjustly refused to apply. I thought the warrant sufficient to protect the *party*, whatever might have been the fate of it if tested by a certiorari. A majority of the court thought otherwise, and their opinion was based mainly upon the fact that the affidavit of the creditor did not disclose "any facts and circumstances," beyond his *information and belief*, of the existence of those credits. The present case is different from that, inasmuch, as we have the additional affidavit of the deputy sheriff, deposing to facts and circumstances which lay the foundation for the belief that the judgment debtor, a short time before, was the owner of a span of colts; that he had parted with them to some one; and that the consideration for which they were sold existed in the hands of some body, in the shape of an indebtedness therefor to the judgment debtor; and that he refused to apply the avails of such property on the execution, but fraudulently concealed the same. These facts and circumstances justified the attorney in swearing to his *belief*, that the judgment debtor had rights in action which he fraudulently concealed and unjustly refused to apply on the debt, and he refers expressly to the affidavit of the deputy as the ground of that belief. The debtor had an opportunity to

Mosher v. The People.

controvert these facts and circumstances, by his own oath or otherwise, but refused to do so. Every intendment, therefore, should be made against him, that can be legitimately drawn from the facts disclosed. If, for example, he had never owned the colts, or if the avails of them had been applied to the payment of some other debt, or had been consumed in the support of his family, the fact was within the debtor's own knowledge, and there is no hardship in presuming against him, if he refuses to give the requisite explanation or denial. The foregoing views are substantially conformable to the opinion of Bronson, J. in *The People v. The Recorder of Albany*, (6 Hill, 429, 431.) In that case, however, the proceeding was based solely upon the affidavit of the creditor, which was deemed defective because it stated the debtor's property and rights in action in the alternative: thus, "that the debtor has rights in action, or some interest in some public or corporate stocks, money, or evidences of debt." The affidavit therefore, presented no distinct allegation on which an issue could be taken, nor could perjury be assigned upon it.

An examination of the cases which have been reviewed in this court by certiorari, will enable us to extract the rule which should govern in these summary proceedings. In *Talman v. Bigelow*, (10 Wend. 420,) the certiorari was to a justice's court, brought to reverse his proceedings in granting an attachment, under 2 R. S. 230, § 28. And they were reversed because the creditor merely swore from "*reports and information*," and the two witnesses "*that they had been informed*," &c. In *Smith v. Luce*, (14 Wend. 237,) the proceedings before a justice in awarding an attachment under the act of 1831 (the non-imprisonment act) were reversed, for the sole reason that the grounds of complaint were stated upon the *belief* of the party, without setting up the *facts and circumstances* on which that belief was founded. In the *Matter of Faulkner*, (4 Hill, 598,) the question arose on a motion to set aside an attachment granted by a circuit judge under the act relative to absconding debtors. The motion was denied, because facts and circumstances were stated in the affidavit tending to establish the

Mosher v. The People.

grounds of the application, and fairly calling on the officer for an exercise of his judgment on the *weight* of the evidence. The court held that in such case, though he erred in his estimate of it, the proceedings were not void for lack of jurisdiction. In *Ex parte Haynes*, (18 *Wend.* 611,) proceedings under the same act were set aside because the affidavits were upon information and belief. And in *Ex parte Robinson*, (21 *Wend.* 671,) the proceedings were reversed on certiorari, although the deponents swore positively to the requisite fact, but did not disclose *the facts and circumstances* upon which the general affirmation was predicated. (See also *Connell v. Lasscells*, 20 *Wend.* 77.) In *Fulton v. Heaton*, (1 *Barb. Sup. Court Rep.* 572,) this court held an affidavit sufficient to justify an attachment, when it stated positively the facts and circumstances, with respect to the debtor's intent to leave the county and go to Canada, although the intent of the debtor was sworn to only from belief. It was so held also in *Johnson v. Moss*, (20 *Wend.* 145.)

From the foregoing cases we may extract the following rules :

1. That an affidavit, made by the creditor or an indifferent person, must swear positively to the facts and circumstances which are relied upon as the foundation of the warrant.
2. That the facts and circumstances must be of such a character as to tend to prove the ground on which the process is asked for.
3. That the intent of the debtor may be shown by the belief of the creditor or his agent, when the requisite facts and circumstances are positively proved. And to these, it is believed, we may add,
4. That in forming his judgment that the allegations of the applicant are established, and that the defendant has done or is about to do any of the acts specified in the 4th section of the act, some weight is due to the omission of the defendant to answer or explain the facts and circumstances relied upon, if they appear to have been within his personal knowledge.

Tested by the foregoing rules the decision of the commissioner was right in this case, and should be affirmed.(a)

Decision of the first judge of Saratoga common pleas affirmed.

(a) See *Broadhead v. McConnell*, (3 *Barb. Sup. Court Rep.* 176,) as to the insufficiency of an affidavit founded on information and belief.

ONONDAGA GENERAL TERM, March, 1849. *Pratt, Gridley,
and Allen, Justices,*

SCHROEPPPEL vs. SHAW.

A dealing, by a creditor, with the principal debtor, in respect to a second or collateral security, will not, at law, discharge the surety from the payment of the principal debt; although he might have been discharged had the creditor dealt with the principal in the same manner, with respect to the original security.

A surety seeking to be relieved from the payment of a debt on the ground of the creditor's delay in enforcing collateral securities must establish the fact that he has lost the benefit of such securities by some act of the creditor inconsistent with his rights as surety, and not by any act or default of his own.

A surety will not be discharged by the delay of the creditor in the prosecution of the principal debtor, or mere inaction on his part in the collection of collateral securities, unaccompanied by an actual binding agreement with the principal for delay, or by fraud, or wilful neglect.

In order to effect the discharge of a surety on the ground of delay in proceeding against the principal, it must be shown that there was a valid agreement, upon a sufficient consideration, to forbear and give time for payment.

From such an agreement the law presumes injury to the surety, and holds him discharged, irrespective of actual damage.

A note given by a mortgagor, to the holder of the mortgage, as a consideration for the postponement of a sale under a decree of foreclosure obtained thereon, is void, and will not support an agreement by the payee to postpone the sale.

IN EQUITY. The bill in this cause stated that on the 4th day of April, 1837, the plaintiff and Charles A. Baker, Theodore Wood and Gardner Lawrence made their promissory note for \$2000, payable one year from date with interest, to Daniel J. Shaw, the defendant, or bearer, and on the 24th of the same month delivered the same to the payee; the plaintiff signing the same "as security" for the other makers. That on the 30th of May, 1836, Joseph I. Bradley and William Jackson gave to Charles A. Baker their bond conditioned for the payment of \$3000 in five equal annual instalments with annual interest; and that as collateral security for the payment of that sum they, at the same time, executed and delivered to Baker a mortgage upon a part of farm lot No. 241 in the city of Syracuse, which was afterwards duly recorded. That the promissory note above mentioned was given for a loan of money made by

Schroeppel v. Shaw.

Shaw to Baker, Wood, and Lawrence, or some or one of them; and that the plaintiff was in fact, as the note on its face imports, a mere surety for the other parties thereto; which fact was known to Shaw. That it was a part of the agreement respecting such loan, that Baker should assign and transfer the said bond and mortgage to Shaw as a further security for the repayment of the money borrowed; and that previous to the giving of the note, it was known to the plaintiff that such loan was to be secured by an assignment of said bond and mortgage, and but for that understanding he would not have joined in the note. That in pursuance of such agreement, Baker, at the same time the note was delivered, executed and delivered to Shaw an assignment of the bond and mortgage, and delivered the bond and mortgage to him: which assignment had not been recorded. That Shaw thereupon executed, under his hand and seal, and delivered back to Baker a receipt in these words: "This is to certify that I have this day received of Charles A. Baker, of Syracuse, a bond and mortgage executed by J. I. Bradley and William Jackson, duly assigned to me; said bond and mortgage is dated May the 30th, 1836, given to secure the payment of \$3000, in five equal annual instalments with annual interest, with said Baker's endorsement upon the same of the receipt of the first payment having been paid to him; said mortgage appears to have been recorded in the clerk's office of Onondaga county, in book No. 32, page 363, &c. that said assignment is made as collateral security to secure to me the payment of a certain promissory note for \$2000, dated April 14, 1837, due in one year, and signed by the said Charles A. Baker, T. Wood, Gardner Lawrence and H. W. Schroeppel, which when paid I am to reassign said bond and mortgage to said Baker; but in case of default in payment of said note, I am to reassign the residue of said bond and mortgage after I shall have received the amount due upon said note. April 24, 1837. Daniel I. Shaw." That default was made in the payment of the said note given to Shaw, but that there was paid thereon, on the 21st day of April, 1838, \$140, and on the 18th of May, 1839, \$141; and that the plaintiff believed no other pay-

Schroeppel v. Shaw.

ment had been made on such note when Shaw commenced a foreclosure of the mortgage as afterwards mentioned. That on the 3d of November, 1840, Shaw filed a bill in his own name, and for his own benefit, against the mortgagors and their wives, before the vice chancellor of the seventh circuit, to foreclose the mortgage. That the first payment, of \$600 and interest, which fell due on the 30th of May, 1837, was paid to Baker before the bond and mortgage were assigned to Shaw; that on the 30th of May, 1838, there fell due upon said bond and mortgage the further sum of \$600 besides interest; on the 30th of May, 1839, the sum of \$600 and interest; and on the 30th of May, 1840, the further sum of \$600 and interest. That the three last mentioned instalments were not paid by the mortgagors, nor any part of such instalments, except a part of the accruing interest; and that Shaw, until he commenced the foreclosure suit, took no proceedings whatever, either at law or in equity, to collect those instalments, or either of them; but on the contrary, during all that time, negligently suffered and permitted the same to remain unpaid and uncollected, without the knowledge, or consent, or approbation of the plaintiff. The plaintiff alleged that during all that time Bradley and Jackson, the mortgagors, were perfectly responsible for the amount unpaid upon their bond and mortgage; and if Shaw had used reasonable diligence in enforcing the bond and mortgage against them he might and would have collected from them, before he instituted the foreclosure suit, moneys enough, or nearly enough, to have fully paid up the note signed by the plaintiff. And the plaintiff insisted that inasmuch as the said note lay in the defendant's hands, overdue, from and after the 4th of April, 1838, and inasmuch as during all the period aforesaid he held as collateral security the bond and mortgage, it was his duty to the plaintiff, as the surety in the note, to have taken earlier proceedings for the enforcement of the bond and mortgage. That after the suit for the foreclosure of the mortgage was instituted, the defendant so negligently and tardily conducted the proceedings therein that no decree of foreclosure and sale was obtained until the 10th of March, 1841, although no

Schroeppel v. Shaw.

defence was interposed by the defendants in that suit. That the plaintiff was advised and believed that Shaw might have enrolled and docketed his decree within 30 days after the same was obtained. That the mortgagors owned a considerable amount of other real estate in Onondaga county, which fact was known to Shaw ; and that had the decree been enrolled and docketed he might have acquired a lien on some other real estate, which would have secured the debt. That the master's report was made on the 13th of Feb. 1841, finding \$3022,24 to be due and unpaid upon the bond and mortgage ; for which amount the decree was obtained. That Shaw caused the mortgaged premises to be advertised for sale, under the decree, on the 8th of May, 1841, but instead of permitting the sale to take place on that day, he wrongfully and negligently caused the same to be postponed, first to the 15th of June then next, then to the 1st day of July then next, and then to be further postponed until the 15th of July ; which several postponements were without the knowledge or consent of the plaintiff. That the first postponement was in consideration of Bradley's giving his note to the defendant for \$200 ; and that such note was given upon no other consideration. That the premises were sold, under the decree, on the 15th of July, 1841, and were purchased by Shaw, the defendant, for \$375 ; leaving a deficiency of \$2851,22, for which the mortgagors were personally liable. That the mortgagors were able to pay the deficiency, for several months after the sale, and it could have been collected out of their real and personal property, and would have been collected had the defendant docketed his decree, and issued execution with reasonable diligence. That he did not enrol such decree, nor docket it in the court of chancery until April 30th, nor in the clerk's office of Onondaga county until May 9, 1842. That this delay was without the knowledge or consent of the plaintiff. That no execution for the deficiency was ever issued. That when the decree was at length docketed Bradley and Jackson had both failed, so that the decree was of no value, and had remained so ever since. That Bradley did not fail until shortly before that time. That Jackson was discharged

Schroeppel v. Shaw.

as a bankrupt, on the 17th of June, 1842, and Bradley on the 20th of Feb. 1843. That on the 14th of September, 1842, Shaw sued the plaintiff and the other makers of the note, in the supreme court, and in August, 1843, recovered a verdict for the full amount of the note, and interest, on which verdict judgment was rendered on the 29th of August thereafter, for \$2814,64 damages and costs, and said judgment was docketed in the clerk's office of Onondaga county on the 1st of September, 1843. That when said judgment was obtained Lawrence and Baker were both insolvent, and still remain so. That there had been paid on the note \$140 on the 21st of April, 1838, \$141 on the 18th of May, 1839, and \$275,29 on the 15th of July, 1840; which last sum was so much of the sum of \$375 bid by Shaw at the sale under the decree, the costs of suit and expenses of sale being first deducted. That before the verdict was taken Shaw agreed with Lawrence to deduct those payments when he should take the verdict: in consequence of which understanding the plaintiff did not appear at the circuit; and the defendant took a verdict for the whole amount of the note, or nearly so, and entered his judgment accordingly, and claims a right to collect it. That the mortgaged premises were worth \$2500, and were worth nearly that when Shaw bid them off for \$375. That the plaintiff is interested in a large amount of real estate in Onondaga and Oswego counties, on which the judgment is a cloud. And the plaintiff insisted that as the bond and mortgage were lost through the gross neglect and misconduct of the defendant, the loss should fall upon him, and that the plaintiff ought in equity to be relieved against the note, and against the judgment recovered upon the same. That this ground of defence was not set up in the suit at law. And the plaintiff claimed that the defendant was accountable for the value of the premises bid off by him, irrespective of his bid; and that inasmuch as he held the bond and mortgage as a security, and not absolutely, but in trust to collect and apply the avails thereof upon the note, he should be deemed to hold the mortgaged premises in the same way. The plaintiff therefore claimed that the premises should be sold under the decree of

Schroeppel v. Shaw.

this court, and the proceeds of the sale applied upon the judgment; and that Shaw should be charged with the fair cash value of the premises after allowing him whatever sums of money it had cost him to acquire a title to the same. The plaintiff also claimed that the payments agreed by Shaw to be deducted before taking a verdict in the action upon the note, should be allowed him. The bill prayed for an answer, without oath, from the defendant; that the plaintiff might be discharged from the payment of the judgment; and the defendant might be decreed to execute to him a discharge of such judgment, so far as it affected the plaintiff; and that the defendant might be perpetually enjoined from issuing an execution upon such judgment as against the plaintiff, and from instituting or prosecuting any action or proceeding against him, for the collection of the said judgment; and for general relief.

The defendant put in an answer, in which he admitted most of the facts set forth in the bill. He denied, however, that the plaintiff was a mere surety, and insisted that he was interested in the note, or the consideration thereof, as principal. And he insisted that if he had suffered the bond and mortgage to remain unpaid and uncollected without the knowledge or consent of the plaintiff, still he would not be justly chargeable with negligence for so doing. He denied that the mortgagors, or either of them, were responsible to pay the amount unpaid upon the bond and mortgage, at any time, as the instalments became due, after the assignment to him; or that he could have collected the same, or any part thereof, but on the contrary he was informed and believed that the mortgagors were, during all that time, and still are, insolvent. And the defendant alleged that on the 30th of May, 1836, Bradley and Jackson gave a bond and mortgage on the same premises to J. H. Colvin for \$2000 payable in six equal annual instalments, with interest. That this mortgage was given for the purchase money, and was delivered before the mortgage to Baker was executed, and was the first lien; which was known to Baker. That the whole amount secured by the Colvin mortgage, except \$473,33, was unpaid at the time the Baker mortgage was

Schroeppel v. Shaw.

assigned to the defendant, and that Baker knew that fact, and that the Colvin mortgage was a prior lien. The defendant denied that at the time of obtaining the decree of foreclosure the mortgagors had other real estate; that if they had, it was incumbered to its full value. He also denied the charges in the bill respecting the postponements of the sale under the decree; and as to the solvency of the mortgagors, alleging, on the contrary, that they had been insolvent for several years. And the answer alleged that an execution was issued for the deficiency, on the 30th of April, 1842, and no property could be found. That at the time of the sale the premises were not worth over \$1200, and, subject to Colvin's lien, they were not worth \$375, the sum bid by him. That after the sale, the defendant, in order to protect his title, purchased the Colvin bond and mortgage for \$1179,17, and took an assignment thereof. That, at the time of making the loan, the defendant did not know of the Colvin bond and mortgage, but that the plaintiff knew of their existence. That the plaintiff never offered to pay the note, nor requested the defendant to collect it of the makers, nor to foreclose the mortgage, or to collect the balance of the decree, nor to indemnify the plaintiff for any costs or expenses. And the defendant insisted that the plaintiff should have made such a request; and that his omission to do so was a full defence. That on the 15th of August, 1840, Colvin obtained a judgment against Bradley and Jackson, on their bond, for \$4000 of debt and costs, which judgment was assigned to the defendant Aug. 17, 1841, and the sum then due was \$1179,07. That execution was issued on this judgment soon after it was docketed, and no property could be found, except what was incumbered for more than what it was worth. The defendant insisted that all the grounds of relief set up in the bill might have been set up as a defence to the suit at law, upon the note, and that therefore the judgment was a bar to this suit. He denied the making of the agreement relative to deducting the payments made upon the note, from the verdict, or that he had ever been requested to make any deduction. He also denied that the mortgaged premises were worth over \$1200 at the

Schroeppel v. Shaw.

time he bid them off; or that the bond and mortgage were lost through his negligence; or that he was accountable to the plaintiff for any thing more than the amount of his bid. And he alleged that he had been at all times ready to re-assign the bond and mortgage on being paid his debt, &c. A replication was filed, and a great mass of testimony was taken, before one of the justices of this court, at his chambers, in pursuance of a stipulation between the solicitors for the respective parties. This evidence it is not deemed necessary to detail, at length; the most important portions being mentioned in the opinion of the court.

G. F. Comstock, for the plaintiff. I. The grounds of relief set up by the plaintiff in this case could not be set up as a defence to the action at law upon the note. (15 *Wend.* 155. 10 *East*, 369. 2 *Russ.* 81. 3 *Cond. Ch. Rep.* 89.) II. It is therefore no defence to this suit that it is brought after trial and judgment at law. On the contrary, it is a well settled ground of jurisdiction in this court that the defendant has proceeded to judgment at law, and now threatens to enforce the judgment contrary to equity. (1.) The power of a court of equity to restrain legal proceedings, whether before or after judgment, is as well settled as the existence of the court itself. And originally the relief was usually granted after judgment. (2 *Story's Eq.* § 874. 2 *R. S.* 189.) (2.) The cases where the court refuse to interfere, are where the defence *was available at law, and no sufficient excuse* is shown for not setting it up. (2 *Story's Eq.* 894, 895.) (3.) Another class of cases is where the defence is a *legal one*, but the facts upon which it rests are solely within the knowledge of the opposite party. It is not necessary now to determine whether the defendant at law in such a case should file a bill of discovery purely, before trial at law, so as to use the answer as evidence on the trial, or whether he may safely wait until after trial and judgment, and then file his bill for discovery and relief. (See 2 *Story's Eq.* § 881; *Norton v. Wood*, 5 *Paige*, 245.) (4.) Another class of cases is where the defence *is a legal one*, but the party could

Schroeppel v. Shaw.

not avail himself of it through some fraud, accident, mistake, or other special circumstances. In those cases, after trial and judgment, courts of equity grant relief with caution and circumspection; but in a case of this kind, free from negligence or fault, relief is never denied. (2 *Story's Eq.* §§ 887, 894, 896. 7 *Cranch*, 332, *per Marshall, J.* 17 *John.* 384. 2 *Story's Eq.* 885, 886. 1 *Paige*, 451.) (5.) But when the defence is purely equitable in its nature, and could not, under any circumstances, be made available at law, the right to resort to a court of equity for relief after judgment, has never been in any case *denied or doubted*. (See *authorities already cited*.) (6.) If the defence at law be embarrassed by doubts and difficulties, that of itself is good ground of jurisdiction in this court. So if the defence be erroneously overruled by a court of law. (2 *Russ.* 81. 17 *John.* 384.) III. The facts in this case show that the bond and mortgage of Bradley and Jackson were lost through the negligence and misconduct of the defendant. This entitles the plaintiff, as surety upon the note, to relief. (1 *Story's Eq.* § 326. *Mayhew v. Crickett*, 1 *Swanst.* 185, 191, and *note(a)*. 8 *Pick.* 122. 4 *Ves. jr.* 824, 833. *Id.* 540. *Williams v. Price*, 1 *Sim. & Stu.* 581. *S. C.* 1 *Eng. Cond. Ch. Rep.* 582.) IV. The defendant is accountable for the value of the premises bid in by him at the mortgage sale, and not for the amount of his bid merely. The foreclosure suit was against Bradley and Jackson, and the sale only foreclosed their equity of redemption. But the assignment of the bond and mortgage to the defendant was itself a mere mortgage, and that has never been foreclosed. (*Slee v. The Manhattan Co.* 1 *Paige*, 48, 78, 79.) V. Besides the value of the land, the payments made to Shaw on the note, before verdict, should be allowed, pursuant to his agreement. (2 *Story's Eq.* § 880.)

D. D. Hillis, for the defendant. The facts charged and proved in this case constitute no ground of relief from the judgment against the plaintiff. The plaintiff was a joint maker of the promissory note upon which the judgment was obtained. No time was given to the makers of this note; or to the prin-

Schroeppel v. Shaw.

cipal debtors; nor was any act done in regard to the note, to discharge them. What was done in regard to the collateral securities cannot here be taken advantage of by the principal debtor. There was no *agreement* to proceed on the collateral securities, or to make the amount of the note out of it, as in the case in 15th Wend. 155. There was no request on the part of the plaintiff, or of any of the other makers, to proceed to the collection of the mortgage. The grounds of relief set up by the plaintiff could have been set up as a defence (if they are a defence) to the action at law upon the note. If they could not, and are only a defence in equity, a bill for relief should have been filed, pending the suit at law. By allowing four years to elapse after judgment, the plaintiff was guilty of laches, and ought not now to have relief.

By the Court, ALLEN, J. It is well settled that the plaintiff could not have successfully defended the suit at law mentioned in the pleadings, upon the grounds relied upon for relief in this action. A dealing by the creditor with the principal in respect of a second or collateral security, will not at law discharge the surety from the payment of the principal debt, although he might have been discharged had the creditor dealt with the principal in the same manner with respect to the original security. (*Pitman's Pr. & Surety*, 203. *Twopenny v. Young*, 3 Barn. & Cress. 208. *Taggard v. Curtenius*, 15 Wend. 155.) The plaintiff, as surety for Baker, for the payment of the original debt to the defendant, had rights well established in principle, and by authority, and which, enforced at a proper time, would in the view now taken by his counsel of the pecuniary ability of Jackson and Bradley, have fully protected him from any possibility of loss. (1.) He was at liberty at any time to pay the principal debt and be subrogated to all the rights of the creditor and to all securities in his hands. (*Story's Eq. Jur.* § 499, and cases cited in notes 1 and 2, § 502. *Hodgson v. Shaw*, 3 Mylne & Keene, 190.) (2.) He could have filed his bill in a court of equity to compel the creditor to seek his remedy first out of the collateral security and to enforce his remedy

Schroeppel v. Shaw.

against the mortgaged premises and the mortgage debtors at once. (*Story's Eq. Jur.* §§ 237, 499. *Ex parte Rushforth*, 10 *Vesey*, 409. *Hayes v. Ward*, 4 *John. Ch. Rep.* 123. *King v. Baldwin*, 2 *Id.* 554. *Huffman v. Hurlbut*, 13 *Wend.* 375.) It is incumbent upon the plaintiff to establish the fact that he has lost the benefit of the collateral securities by some act of the defendant inconsistent with his rights as surety, and not by any act or default of his own. It is settled by an unbroken line of authorities, that mere delay on the part of the creditor to enforce his remedy against the principal debtor will not discharge the surety; but to effect such discharge there must be a valid agreement, upon a sufficient consideration, to forbear and give day of payment. From such an agreement the law presumes injury to the surety, and holds him discharged. (*Wright v. Simpson*, 6 *Vesey*, 714. *Boulton v. Stutts*, 18 *Id.* 20. *Commercial Bank v. French*, 21 *Pick.* 489. *United States v. Kirkpatrick*, 9 *Wheaton*, 760. *Fulton v. Matthews*, 15 *John.* 433. *Crealth v. Sims*, 5 *Howard*, 192. *United States v. Hunt*, 1 *Gall.* 42.) In the language of Lord Eldon in *Wright v. Simpson*, adopted by Chancellor Kent in *King v. Baldwin*, the surety is a guarantor, and it is his business to see whether the principal pays, and not that of the creditor. The reason of the rule which governs the rights and determines the liability of the surety, in case of a delay by the creditor to prosecute his remedy against the principal debtor, applies with full force to the action of the creditor in respect to collateral securities in his hands. In both cases the surety is in default. He has omitted to perform his part of the agreement. In the case now under consideration the plaintiff undertook to pay the defendant the full amount of his debt before the first instalment became due upon the bond and mortgage against Bradley and Jackson; and had he performed his agreement he would have been entitled to an assignment of that security, and would have had the actual possession and full control of it at the time the first instalment became due. How, then, can it be said that the plaintiff has lost the benefit of the securities by the act of the defendant in omitting to prosecute, when it is only by the viola-

Schroeppel v. Shaw.

tion of the positive agreement of the plaintiff that the defendant retained or had them in his possession at a time when they might have been enforced? If in the one case it is the duty of the surety, as a guarantor, to see that the principal pays, why is it not in the other case equally his duty to see that the principal pays the original debt and redeems the collaterals? A different rule would make the collaterals the principal securities, and then apply to them a law more stringent as against the creditor than would be applied if they were in fact the principal and not collateral securities. It would enable the plaintiff to take advantage of his own laches and default. It would establish a rule dangerous to creditors, and difficult of execution and application. The rules of law which govern the dealing of, the creditor with the principal debtor are plain, reasonable and easy of application. Mere *inaction*, unaccompanied with a binding agreement for delay, will not discharge the surety; and a delay in pursuance of a valid contract for that purpose, will operate as a discharge of the surety, irrespective of actual damage. But if the rule contended for by the counsel for the plaintiff is the true rule, then each case of dealing with collaterals must be decided upon its peculiar circumstances, and not unfrequently by the fluctuating and uncertain discretion of an individual judge or of a jury. I should have great difficulty in determining, from the evidence, that Bradley was *solvent*, within the true meaning of that term, at any time after the first instalment became due upon the bond and mortgage, (*Huffman v. Hulbert*, 13 *Wend.* 377;) and that the amount of the first instalment would, *with certainty*, have been collected upon an immediate prosecution of the demand; and if that should have been collected the doubt is increased as to the next, and each subsequent instalment. It is true that from the evidence I should think it *probable* the first and perhaps the second instalment might have been collected. But in his own language Bradley was "hard pressed." There were judgments and executions against him, and although he paid them until 1842, it is impossible to say that the attempt to enforce the

Schroeppel v. Shaw.

collection of this bond would not have been the cause of his failure at that time.

The law requires good faith on the part of the creditor towards the surety; and hence he is discharged from liability if the creditor does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act when required by the surety which his duty requires him to do, and the omission proves injurious to the surety. (*Story's Eq. Jur.* § 325.)

X An omission to sue the principal is not a breach of faith to the
X surety, and it is difficult to perceive how an omission to prose-
X cute collateral securities can be a breach of faith, unless there
X is an express agreement on the part of the creditor to use rea-
X sonable diligence in their collection, or do some act in respect
X to them necessary to their validity as securities, or such agree-
ment can be inferred from the circumstances of the case, or
from the character and situation of the securities. Justice
Story, in treating of constructive frauds which will discharge
a surety, says, "if the creditor has any security from the
debtor and he parts with it without communication with the
surety, or by his *gross negligence* it is lost, that will operate
at least to the value of the security, to discharge the surety."
(*Story's Eq. Jur.* § 326.) And for authority he refers in note
(1) to *Mayhew v. Crickett*, (2 *Swanst.* 185, 191, and note a.)
Law v. East India Company, (4 *Vesey*, 833,) and *Capel*
v. Butler, (2 *Sim. & Stu.* 457.) By referring to those cases
it will be seen that "gross negligence" is something beyond,
and entirely distinct from, mere delay. Indeed, Judge Story, in
the same section and in the paragraph immediately preceding
that quoted, asserts the principle that there is no positive duty
incumbent on the creditor, to prosecute measures of active dil-
igence—evidently treating delay as one thing and negligence
or omission of duty as another and quite distinct matter. In
Mayhew v. Crickett a debt was secured by two promissory
notes, each for half the amount, of two sureties, and also by
a warrant of attorney of the principal debtor upon which the
creditor had entered up judgment and taken the goods of the
debtor in execution, but he afterwards withdrew the execution.

Schroeppel v. Shaw.

Here there was something more than mere omission to enforce the judgment. There was a *parting with the security*; the goods of the principal debtor were released from execution without communication with the surety. There was an act of the creditor which, as he was trustee for the sureties, was a fraud upon them. In *Law v. East India Company*, the creditors had settled with the principal debtor and paid him a balance found due upon that settlement and suffered him to remove with his property over which they had control, and the court held the sureties for the settlement of the account and payment of any balance discharged by such settlement and payment; although it was erroneous in fact, the principal debtor afterwards becoming insolvent. In *Capel v. Butler* the principal debtor assigned two vessels as collateral security for the payment of an annuity also secured by the joint bond of the plaintiff and the principal debtor, and the creditor neglected to perfect the assignment of the vessels in the mode required by acts of parliament for the registry of vessels and the transfer of property therein, by means of which omission the debtor was enabled to and did actually sell the vessels to other persons, and the surety had lost the benefit of the assignments. The nature of the security required something to be done at once by the creditor to make it a valid security, and hence the law should, as it doubtless did imply an agreement on his part to perform that act without which the security was invalid. An omission to do this would be gross neglect in an agent, bailee or trustee, and would be a breach of good faith on the part of the creditor toward the surety. Judge Story, in the section quoted, doubtless had in view neglect of the character of that in the case last cited as the *gross neglect* which should discharge the surety, that is, the omission of an act agreed to be done by him, or evidently imposed upon him by the situation and character of the securities in his hands. Indeed, a request from the surety to do this act might be implied, so necessary was it to his indemnity to bring the case within the principle discharging a surety "by the omission of the creditor to do an act when required by the surety which his duty enjoins him to do, and

Schroeppel v. Shaw.

the omission to do which proves injurious to the surety." The other cases relied upon by Judge Story are instances of the parting with the securities by the creditor, to the prejudice of the surety.

Ex parte Muir, (2 Cox, 63,) and *Williams v. Pierce*, (1 Sim. & Stuart, 581,) are relied upon by the counsel for the plaintiff in support of the principle contended for by him, that delay in the prosecution of the collateral securities, when by reason of such delay they become less available, discharges the surety. In the first case, J. T. gave his bond and warrant of attorney to D., conditioned for the payment of a certain debt by instalments, and D. assigned the bond and warrant of attorney to C. his creditor, and the latter failed to enter up the judgment, in consequence of which, upon the obligor's decease, other creditors obtained a priority which by perfecting the judgment and thereby making the debt of a higher nature he might have prevented, and secured the debt upon the real and personal estate of the obligor. It was held that the creditor was chargeable for his default, to the amount of the loss incurred by the forbearance. This case is distinguishable from the one now under consideration. (1.) The bond and warrant of attorney in their nature required further action to make them valid securities of the character and degree contemplated by the parties, and the debtor put it out of his power to perform this act by placing the papers in the hands of his creditor, and making that creditor his attorney in respect to them and the debt secured by them. There was therefore, as in the case of *Capel v. Butler*, a duty imposed upon the creditor in respect to the securities, by their character and condition. The correctness of the decision in the particular cause may be conceded; but the opinion of the lord chancellor goes farther than was necessary to decide the case, and his reasoning has not at all times been fully acquiesced in. The case is not even cited or referred to by Justice Story in his treatise on equity jurisprudence, when treating of the relative rights and duties of principal and surety. And while in *Williams v. Price* the decision was followed, the Vice Chancellor, Sir John Leach, takes

Schroeppel v. Shaw.

especial care to withhold his assent from the argument of the lord chancellor, and the principles advanced by him. (2.) In *Ex parte Muir*, the lord chancellor held that the bond which was the subject of the controversy had been assigned absolutely to the creditor and to its full amount, in discharge of the debt of the assignor. If the bond was assigned in payment of the principal debt, to be applied when collected, it might well be that the creditor was bound to use ordinary diligence in its collection, and to apply as payment upon the original debt what was actually collected or what might with reasonable diligence have been collected. This would be so within *Dayton v. Trull*, (23 Wend. 345.) But in the case before us, the assignment of the bond and mortgage of Bradley and Jackson was in pursuance of and a part of the contract by which the principal debt originated and was conceded to be as collateral to it, and the principal debt was to become due and payable before any part of the amount secured by the bond and mortgage became due. In *Williams v. Price*, a debtor had assigned to his creditor as collateral security for his debt, a judgment which he had recovered by confession against a third person, and the creditor had sued out two or more executions upon the judgment, but had not put them in the sheriff's hands, or having placed them in the sheriff's hands had withdrawn them, and after that had negotiated with the judgment debtor and had given him time for payment, and had taken from him acceptances which were dishonored, until finally the judgment was lost. The Vice Chancellor, Sir John Leach, refrained from expressing an opinion upon the question whether the creditor was bound to use legal diligence to give effect to the judgment, or whether he might remain passive until required by the assignee to resort to legal diligence, and said it was not necessary to determine those questions, but based his decision upon that of *Ex parte Muir*, and upon the fact that the creditor, by suing out execution, assumed the possession or control of the judgment in exclusion of the assignee, and that it was within the principle which charges the creditor in possession of property held by him as a security not only with what he actually re-

Schroeppel v. Shaw.

causes but with what he might have received but for his wilful default or neglect. Many of the features of this case, and which by the vice chancellor were held to control the decision, are wanting in the one before us; and it would be an unwarrantable extension of the principles of any decided case to hold the surety discharged by mere delay of the creditor in the prosecution of the principal debtor, or in the collection of collateral securities, unaccompanied by an actual agreement, fraud or wilful neglect. In the note to *Paine v. Packard*, and *King v. Baldwin*, (2 Am. Lead. Cases, 127,) it is attempted to reconcile the cases of *Ex parte Muir* and *Williams v. Price* with the decisions which hold that mere delay or omission to prosecute, on the part of the creditor, will not discharge a surety, by making a distinction between cases in which the creditor has received collateral securities directly from and by the voluntary act of his debtor, and those in which he has acquired them by legal or coercive measures, and by his own acts. But I find no case in which this distinction is taken, and there appears to be no distinction upon principle. The rights of the surety are the same whether the collateral security is taken at the time or after he has incurred his obligation, and whether he knew the fact or not; and it would seem to follow that it was immaterial by what means it was acquired. His creditor is alike the trustee of the surety in every case. (*Pitman on Pr. & Surety*, 114.) If the decisions referred to are put upon the grounds on which they may be put, and indeed upon the grounds upon which they were placed by the courts by which they were pronounced, then there are no circumstances to be reconciled, and the law will be harmonious. The same duties and the same liabilities will result from this quasi relation of trustee and cestui que trust, as to securities in the hands of the creditor, which exist between the creditor and the surety of the debtor as to the principal obligation, subject to be varied only by the express or implied contract of the parties.

Baker v. Briggs, (8 Pick. 122,) merely decides that a creditor who has his debt secured by a surety and has also property pledged to him by his principal debtor, may not surrender the

Schroeppel v. Shaw.

property without the knowledge and consent of the surety; and if he does so he thereby discharges the surety to the amount of the property given up. In *Taggart v. Jones*, (15 *Wend.* 155,) there was an agreement that the creditor should use due diligence in disposing of the property pledged, (stock in a bridge company,) at the highest price, and this was omitted for some four years and until after the bridge was carried off and the value of the stock greatly depreciated. And it is of such a case that Bronson, J. says "whether the matters pleaded would entitle the defendants to relief in a court of equity need not be considered."

Up to November, 1840, the defendant took no action in respect to the bond and mortgage. He had merely delayed the commencement of proceedings to enforce their collection; and for mere delay we think he is not under the circumstances chargeable for any loss which may have ensued. He then undertook the foreclosure, and there is no evidence that there was any unnecessary delay in the proceedings up to the time of the decree and the advertisement of the mortgaged premises for sale; at least, no evidence of such delay as would amount to wilful default or negligence, or be evidence of fraud. The postponements of the sale appear not to have been unreasonable. They were for short periods, and with a view to procure an enhanced price for the premises, or to enable the mortgagees to do so. In the language of the vice chancellor, in *Williams v. Price*, "I think it would be difficult to find a principle for charging such a creditor simply upon the ground that he gave time to the debtor, upon the judgment; for it may be that the giving of time is a provident act, and affords the best chance of securing the debt." But it is said that the postponement upon one occasion was at the request of the mortgagor, and in consideration of his note for two hundred dollars, and that the case is therefore one of giving time in pursuance of a valid contract for that purpose. But the note itself in that case would be void, and could not avail as a consideration to support the agreement to give time. (*Pitman's Pr. and Surety*, 168. 2 *Am. Lead. Cases*, 171. *Tudor v. Goodlow*, 1 *B. Monroe*, 322.

Schroeppel v. Shaw.

Pyle v. Clark, 3 *Id.* 262, and *Scott v. Hull*, 6 *Id.* 285, cited 2 *Am. Lead. Cases*, 173. 1 *Comstock*, 274.) In this case, the usurious character of the note forming the consideration of this agreement, appears by the plaintiff's showing, and is not set up and proved by the defendant to invalidate an agreement apparently valid. We may add that the postponements of the sale were with the knowledge and assent of Gardner Lawrence, one of the co-sureties with the plaintiff in this suit and a joint debtor with him. We then come to the delay in docketing the decree for the deficiency, so as to make it a lien upon the real property of the mortgagor, and in enforcing the collection thereof by execution, from the last of July, 1841, until about the 1st of May, 1842.

During all this time, the defendant did no act inconsistent with the rights of the plaintiff as a surety. He was merely inactive. He did not, as in *Williams v. Price*, sue out executions, and then withhold them from the proper officer; or negotiate with the mortgagor to give him further time, by agreement, and take bills for the amount of the debt on time, which in that case the vice chancellor held to be such an interference and assumption of control over the judgment as operated to discharge the surety. In this case, the plaintiff might at any time have paid the debt, and been subrogated to the rights of the defendant to the bond and mortgage and decree thereon, and have received the same unembarrassed by any agreement or negotiation by the defendant, and in a situation to be immediately enforced. The defendant had foreclosed the mortgage and sold the mortgaged premises, and then remained passive, as we think he might safely do, without prejudicing his claims, upon the surety. If Jackson and Bradley had been the principal debtors, and he had commenced proceedings against them, he could have stopped at any stage, and the surety could not complain. (*Lenox v. Prout*, 3 *Wheaton*, 520. *Com. of Berks Co. v. Ross*, 3 *Binney*, 520. *United States v. Simpson*, 3 *Penn.* 457. *Minerdorff v. Snyder*, 5 *Watts*, 179.) The most that can be claimed, is that by the assignment of the bond and mortgage to the defendant, the obligors and mortgagors,

Schroeppel v. Shaw.

Jackson and Bradley, became quasi principal debtors, not only so far as the sureties for Baker are concerned, but that Baker, so far as these securities were concerned, became a quasi surety or entitled to all the rights of a surety; and in that view mere delay could not in any case vitiate the claim as against Baker and his sureties. There is no claim for relief made in the case peculiar to the plaintiff *as a surety*; and all the defendants in the judgment should have been parties to the suit. (*Beggs v. Butler*, 9 Paige, 226. *Boughton v. Allen*, 11 Id. 321.) But this point was not made in the answer, nor upon the argument, and the decision is not therefore put upon the ground of a want of parties.

The next claim is, that certain payments should be allowed which might have been allowed upon the trial of the suit at law. The plaintiff had a perfect remedy in respect to these payments, in the action at law, and should have sought it there. But this point is not taken in the answer as distinctly as it should have been; and there is equity in the claim of the plaintiff to have them allowed at this time. The agreement of the defendant was to make certain admissions upon the trial, and the attorney for the plaintiff testifies, that in consideration of that agreement he agreed not to defend the suit, and relying upon it, omitted to attend upon the trial; and the defendant in pleading admits this to be true, by denying in his answer that he ever attempted or intended to enforce the judgment for the full amount. It is true, that after verdict, the plaintiff and his co-debtors might and should have sought relief in the court in which the suit was pending. He, by his attorney, had notice very shortly after the verdict, that the payments had not been allowed, and addressed the defendant upon the subject. (*Story's Eq. Jur.* §§ 894, 895. *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332.) But the defendant says he never claimed the full amount of the judgment, and does not very distinctly take the ground that the remedy was at law, and we therefore though with some hesitation, allow the payments at this time. The plaintiff next claims that the defendant should be decreed to have taken the title to the premises purchased by

Schroeppel v. Shaw.

him upon the foreclosure of the Jackson and Bradley mortgage in trust as security for the payment of the debt, and for the benefit of the debtors. There is a difficulty in making such decree, for want of parties. Lawrence, Baker, and the representatives of Wood will not be bound by the decree. After the sale of the premises and an accounting with the present plaintiff in respect to the trust property, *they* may call upon him to account with them; or they may repudiate the trust and insist that he purchased the property for himself at the price bid, and that that sum was absolutely paid upon the judgment at that time; and the defendant may be called to litigate that question. But inasmuch as the defendant did not, in fact, credit the amount of his bid upon the note, and thus give color to the claim that he had bought the premises as trustee to apply the avails, whatever they might be, upon a resale, to the payment of the debt, and as his counsel upon the argument conceded that such decree might be entered, a decree may be entered declaring that the defendant holds the premises upon the same trusts, and for the same purposes, that he held the bond and mortgage, and directing a reference to Peter Outwater, jun. to ascertain and compute the amount paid to the plaintiff upon the verdict in the suit at law, and which should then have been credited and allowed to the plaintiff and his co-debtors, and directing the allowance of said sum with interest, in part payment of the judgments; and also to ascertain and compute the amount due to him for the amount paid to acquire the Colvin mortgage, and for taxes, insurances, agencies and other expenses in and about the property and its preservation, with interest to the date of the report, deducting what he may have received for rents and profits, and directing a sale thereof, at public auction, upon the notice required for the sale of real estate on an execution at law; and that out of the proceeds thereof be paid, 1, the amount which shall be reported due to the defendant for said payments, with interest to the time of payment; and 2d, the residue to the defendant, to apply in payment of his judgment mentioned in the pleadings, and that said judgment be deemed satisfied, to the amount so paid.

Wood v. Hubbell.

Neither party is to have costs against the other. For although the plaintiff has succeeded in part he had made no call upon the defendant for the relief now obtained, before filing the bill; and the defendant, although he has succeeded on the principal grounds, should have demurred to the bill. He has increased the costs by his defence, unnecessarily, and therefore should not recover them as against the plaintiff.

ONTARIO GENERAL TERM, May, 1849. *Johnson, Maynard, Welles, and Selden*, Justices.

WOOD vs. HUBBELL and others.

Where a demised building is destroyed by fire, between the execution of the lease and the commencement of the term, and before the lessee has taken possession of the premises, he is not liable to pay rent.

Until the term commences and possession is given of the demised premises, a lease is an executory contract on the part of the lessor, for a breach of which he may be prosecuted, in the same manner as upon any other executory contract. And it is the same on the part of the lessee. *Per* JOHNSON, P. J.

Previous to the commencement of the term, the rights of the parties to a lease rest in mere contract. *Per* JOHNSON, P. J.

The surrender of the possession, by the lessor, to the lessee, is a condition precedent to the right of the former to demand, or the obligation of the latter to pay, rent.

And the rule is the same whether the lessor *refuses* or is *unable*, to give possession.

IN EQUITY. This was an appeal from a decision of the late vice chancellor of the 8th circuit. The complainant, on the 8th of November, 1843, took a lease from the defendants of a tavern stand in the city of Rochester, known as the mansion house, for the term of eight years from April, 1844, at an annual rent of \$1000, payable quarterly. The building was destroyed by fire in February, before the term commenced. The bill alleged that before the lease was made and signed, it was

Wood v. Hubbell.

agreed between the complainant and the defendants, that it should contain a clause that in case the premises should be destroyed by fire during the term, the lease and all covenants for the payment of further rent should terminate. That in drawing the lease the clause was omitted, by oversight and mistake, and the lease was executed by the parties without noticing the omission. The defendants rebuilt the house in July, 1844, and the complainant never went into or took possession. After the destruction of the building the complainant called upon the defendants to cancel the lease, but they refused to do so; and after the expiration of the first quarter brought their action for the recovery of the quarter's rent. The bill was filed to have the lease reformed, by the insertion of the clause in regard to the destruction of the building by fire, and then delivered up to be cancelled, and to restrain the suit at law. The cause was heard on pleadings and proofs before Vice Chancellor Whittlesey, who made a decree dismissing the bill; and the complainant appealed from the decree.

H. Humphrey, for the appellant.

L. Farrar, for the respondents.

By the Court, JOHNSON, P. J. The lease, as drawn up and executed by the parties, must be presumed to contain the true agreement between them. And the presumption is very strong, and exceedingly difficult to be overcome, where, as in this instance, the instrument is drawn up in the presence of the parties and deliberately read over in their hearing, and afterwards subscribed by them without objection. It is obvious, however, that a mistake might be made under such circumstances, and some very material provision which the parties had agreed upon and intended to have inserted in the writing be left out through mistake and oversight, so that notwithstanding all their care and deliberation, the instrument as executed would not stand as a true and faithful witness of the entire agreement. In such a case it would be the unquestionable right and duty

Wood v. Hubbell.

of a court of equity to reform the instrument so as to make it conformable to the precise intent of the parties. (*Story's Eq.* §§. 152, 155, 156.) And relief will be afforded by enforcing the real agreement, or ordering the imperfect one to be surrendered to be cancelled, according to the justice and equity of the case as established by the admissions or proofs of the parties. (*Gates v. Greene*, 4 *Paige*, 355. *Keisselbrack v. Livingston*, 4 *John. Ch.* 144. *Gillespie v. Moore*, 2 *Id.* 585. *Story's Eq.* § 161.) But to warrant this interference, the proof of the mistake or unintentional omission must be so clear as to leave no reasonable doubt whatever of the fact. If the evidence be loose, equivocal, or contradictory, courts of equity should never interfere, but should leave the contract to stand, and allow it to be enforced as it was executed between the parties. (*Story's Eq.* § 157, and cases last above cited.)

In this case the evidence is not of that clear, unequivocal and satisfactory character that would warrant us in ordering this provision to be inserted, or the lease to be surrendered to be cancelled on the ground of mistake. The most that can possibly be said from the evidence in the case is, that although it is probable there was such an understanding, it is still quite doubtful whether it was definitely agreed upon; and whether the mistake was not after all as to the rule of law in regard to the rights of the parties under such a lease as this, in case of the destruction of the building by fire.

We must not allow the strong natural and moral equity which we cannot fail to see existing against the defendants' claim for rent, under the circumstances of this case, to divert our attention from those general and salutary rules which courts have from time to time established as the law of equity. The evidence as to the agreement that the lease should cease to be obligatory in case of the destruction of the building by fire, and the oversight or mistake in failing to insert it in the lease, is not so clear and certain as to place the matter beyond reasonable doubt; and relief on this ground must be denied.

But admitting there was no mistake, and that the lease contains the true agreement between the parties, is not the com-

Wood v. Hubbell.

plainant entitled to have it surrendered to be cancelled, *quia timet*? It is true he seeks by his bill to have the lease reformed, and then cancelled. But if such a case is made by the bill and answer that we can see clearly that the lease should be cancelled, without reformation and without reference to any mistake in regard to its terms, I do not see why the relief should be withheld. It is not inconsistent with that prayed for, but is the main thing which the complainant seeks to accomplish by his proceeding; and I think it should be regarded as sufficient if the facts established entitle the party to the particular relief sought, although his reasons for demanding it may be insufficient. It is enough that good and sufficient reasons are fairly deducible from the case presented. This is a distinct and very ancient head of equity jurisdiction, and proceeds upon the general notion that wherever a party holds a paper purporting on its face to be a claim against another, which ought not in law or equity to be enforced, equity will order it to be surrendered or cancelled, to relieve the other party from the apprehension of its being used against him improperly at some future day. It is said, "if an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose." (*Story's Eq.* § 700.) And this rule prevails not only in regard to instruments fraudulent in their inception and therefore void, but as well in respect to those originally valid, but which, by the happening of some subsequent event, have become *functus officio*. (*Story's Eq.* § 705.) And it seems not at all material whether a suit is actually commenced or the party has a perfect defence at law, as the specific relief is such as courts of law cannot give. (*Story's Eq.* §§ 699, 700, 701. *Hamilton v. Cummins*, 1 *John. Ch.* 517. *Gates v. Green*, 4 *Paige*, 355.)

The bill in this case alleges, and the answer fully admits, the making of the lease in November, 1843, to commence on the 1st of April, 1844; the destruction of the demised building by fire in February, before the term commenced; the request of the complainant in March, after such destruction, to the defendants to cancel the lease, and their refusal; and the subsequent

Wood v. Hubbell.

erection of a new building upon the same site by the defendants, and its occupancy by them. There is no pretence that the complainant ever took or had possession of the building, or any portion of the premises, for an hour. The building destroyed was the thing leased, as is apparent from the terms of the lease; and when the term was to commence it had no existence, and no possession or enjoyment could possibly be had by the complainant. When the new building was erected the defendants took possession of it and rented it to another without any regard to the complainant's lease. Ought the complainant to pay, or can he, under these circumstances, be compelled to pay, any portion of the rent which he covenanted to pay by the lease? Let us see how the parties stood on the first of April when, by the lease, the term was to commence. The defendants, the lessors, were under an implied covenant which was as much a part of the contract and as obligatory as any portion of the writing, to put the complainant into the full and perfect possession of the demised building. For a failure to do so they were liable to be prosecuted upon the implied covenant, for the damages the complainant had sustained, and they could only relieve themselves by establishing some fact which would exonerate them from the performance of any other obligation. (*Chitty on Cont.* 318. *Grannis v. Clark*, 8 Cowen, 36.) They were also bound to deliver possession of the premises, in the same condition, substantially, as they were in when the agreement was made; or the complainant was not bound to enter and occupy, or to pay rent in case he did not. (*Cleves v. Willoughby*, 7 Hill, 83.) It is clear, therefore, that until the term commences and possession is given of the demised premises, the lease is an executory contract on the part of the lessor; for the breach of which he may be prosecuted in the same manner as upon any other executory contract. And so it is on the part of the lessee. Before the term commences he has only an *interesse termini* and no estate; a right to a term at a future day; but there is no privity of estate between the parties until the term commences and possession is given. (4 *Kent's Com.* 96.) Until then the lease is not operative as the conveyance

Wood v. Hubbell.

of an estate. The lessee can maintain no possessory action. The rights of the parties rest in mere contract. The surrender of the possession by the lessor to the lessee is obviously a condition precedent to the right of the former to demand, or the obligation of the latter to pay rent. If the lessor refuses to give possession, surely he can have no claim to the payment; and I think it equally clear that he has none where he is unable to do so. In either case the consideration on which the promise to pay rent rests fails, and there is no principle upon which it can be enforced.

Here, on the first of April, the building which the defendants had agreed to give the complainant possession of is destroyed. It is their loss. They are unable to perform. Yet being wholly in default they refuse to cancel the lease, and call upon the complainant to fulfil its stipulations on his part. The claim is manifestly unjust, and cannot be enforced.

The well established rule that a tenant is bound to pay rent according to the covenants in his lease, notwithstanding the destruction of the premises during the term, has no application to this case. Courts of equity, in view of the manifest injustice of compelling a party to pay for that of which he could have no enjoyment, struggled long and hard against the adoption of that rule. But it has been too long and well settled to admit of doubt or question. (3 *Kent's Com.* 465, 6, 7. 4 *Paige*, 355.) It need not however be extended, and there can be no necessity or excuse for extending it to a case like this. There is good reason, where the landlord has performed on his part and put the tenant into possession, for holding the tenant to his obligation to pay, but it does not apply to a case where the landlord fails to give possession according to his agreement, and is himself entirely in default.

We are not asked to dismiss the bill on the ground that the complainant has a good defence at law to the action against him for rent. That defence is not set up in the answer, or insisted upon in the argument. On the contrary, the defendants insist that their claim for the first quarter's rent is a legal and valid claim. Although I am clear that the complainant has a

Prosser v. Secor.

good defence at law, still I regard it as a case where the jurisdiction of equity is unquestionable, and ought to be exercised, to prevent injustice in future. The defendants may, with the same propriety, for aught I can see, at some future day set up their claim for every quarter's rent through the whole term of eight years; and thus subject the complainant to constant apprehension and vexation.

I am of opinion, therefore, that the decree of the vice chancellor dismissing the bill should be reversed, and that a decree should be entered, requiring the defendants, within ten days after notice of the decree, to surrender the lease in question to the clerk of Monroe county to be cancelled, and perpetually enjoining them from prosecuting said lease at law for the recovery of rent; and that they pay the costs which have accrued in the suit at law, and also the costs of this suit.

SAME TERM. *Before the same Justices.*

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PROSSER and others vs. SECOR.

In order to enable a minister of the gospel to maintain an action against assessors, for assessing his property and thereby subjecting him to the payment of taxes, he must show affirmatively, 1. That he is a minister of the gospel, or priest of some denomination, and 2. That the value of both his real and personal property does not exceed \$1500.

Where a justice, in his return to a certiorari, omits to certify that the return contains all the evidence given before him, the court will presume, in the absence of such certificate, that additional evidence was given, sufficient to support the verdict.

Assessors have no authority to enter upon the assessment roll the name of any person whose property is by law exempt from taxation; nor to impose an assessment thereon. They have no jurisdiction whatever over such persons, or their property. Nor can they acquire any by any act, or decision, of their own.

Accordingly *held*, that assessors have no jurisdiction over the person or the prop-

Prosser v. Secor.

erty of a minister of the gospel not having real and personal estate exceeding the value of \$1500, which will authorize them to impose an assessment upon his property.

The assessment of property is a judicial act, upon which a certiorari will lie.

But to make an assessment legal, the assessors must have jurisdiction of the particular case. If they transcend the limits of their authority, and undertake to assess property exempt by statute, they cease to be judges, and are responsible for all the consequences.

In determining whether they have jurisdiction or not, in a given case, assessors do not act judicially.

No officer can acquire jurisdiction by deciding that he has it. In all such cases every officer, whether judicial or ministerial, decides at his peril. *Per* JOHNSON, P. J.

ERROR from the Orleans common pleas. The suit was originally commenced before a justice of the peace. The declaration before the justice was in case. Secor, the plaintiff in the justice's court, declared against Prosser and others (the plaintiffs in error) as assessors, for assessing him as a taxable inhabitant of the town of Kendall in the county of Monroe, in the year 1844. The declaration averred that Secor was a minister of the gospel, and the owner and occupant of a farm in that town, in the year 1844, and that the whole value of his real and personal estate did not exceed \$1500, and was wholly exempt from taxation. That the defendants, being assessors, and knowing him to be a minister, and that his property was exempt, assessed his said farm upon the assessment roll of that year, by means whereof taxes were afterwards assessed, and levied and collected from him. The plea was the general issue. The assessment roll was introduced on the trial, and the tax list, by which it appeared that the defendant was assessed for 104 acres of land, valued at \$1280, and he was taxed therefor \$6,50. The plaintiff also proved that he was assessed for highway work in consequence of the assessment; that \$3 had been collected from him on complaint for neglecting to work on the highway pursuant to notice, and that he had paid his tax to the collector on its being demanded. He farther proved that he resided upon the land assessed, and, by one witness, that he did not know of his occupying any other land in that town. It did not appear from the return of the justice that any

Prosser v. Secor.

evidence was given on the trial as to the value of the defendant's personal property, but the return did not state, in express terms, that the whole evidence given on the trial was returned. The plaintiff gave evidence to show that he was a minister of the Wesleyan Methodist denomination, and the defendants introduced some proof to show that he was a practicing physician, and not a regular minister. The return stated that when the plaintiff rested, the defendants moved for a nonsuit, upon two grounds, 1. That the assessors were not liable for acts in their nature judicial; and 2. That the proof was insufficient to authorize a recovery. But the return did not state in what respect the proof was claimed to be insufficient. The justice gave judgment in favor of the plaintiff below for \$8,37 damages, and \$5,00 costs, which was affirmed by the common pleas; and the defendants brought a writ of error.

H. R. Selden, for the plaintiffs in error.

Church & Davis, for the defendant in error.

By the Court, JOHNSON, P. J. It is provided by 1 R. S. 386, § 4, that the personal property of every minister of the gospel or priest of every denomination, and the real estate of such minister or priest when occupied by him, provided such real and personal estate do not exceed the value of \$1500, shall be exempt from taxation. By § 5 it is provided that if such real and personal estate exceeds the value of \$1500 that sum shall be deducted from the valuation, and the residue shall be liable to taxation.

The defendant in error, in order to bring himself within the exemption, and maintain an action against the assessors, was bound to show affirmatively, 1. That he was a minister of the gospel, or priest of some denomination, and 2. That the value of both his real and personal property did not exceed \$1500. He is liable to be taxed for the excess of his estate above \$1500, the same as other persons, notwithstanding his ministerial functions. It is not sufficient for a person, in such a case, to

Prommer v. Secor.

show that he was a minister or priest, but he must also show that the property assessed was within the exemption. (*Von Sickler v. Jacobs*, 14 *John*. 434. *Bowne v. Witt*, 19 *Wend*. 475.) Otherwise we are bound to presume that the assessors deducted \$1500, and only assessed the residue. The presumption is that public officers do their duty. (*Weaver v. Devendorf*, 3 *Denio*, 119.)

The return does not show that any evidence was offered on the trial touching the amount or value of personal property owned by the defendant, or the value of the real estate, except what is furnished by the assessment roll. And, were we to be governed by what appears upon the face of the return, alone, I should have no hesitation in saying that no action could be sustained upon the evidence. The presumption would be that the assessors made the proper deduction, and assessed the residue only. But the justice has omitted to certify that the return contains all the evidence given before him, and according to the decisions in a great number of cases we are bound to presume, in the absence of such certificate, that additional evidence was given sufficient to support the verdict. (*Cow. Tr.* 988. *Oakley v. Van Horn*, 21 *Wend*. 305. *Baum v. Tarpenney*, 3 *Hill*, 75. *Crippen v. Abrams*, *Court of Appeals*, *Nov. term*, 1848.) If the return does in fact contain all the evidence, the plaintiffs should have compelled the justice to amend, that it might so appear. The general objection that the evidence was insufficient is not enough. The specific objection now made was not taken, or even alluded to, as far as appears by the return, before the justice; where, if made, it might have been obviated. I shall assume therefore that the plaintiff before the magistrate, in addition to the proof of his being a minister of the gospel, gave sufficient evidence in regard to his real and personal estate to satisfy the justice that it was wholly exempt from assessment or taxation under the statute; and this brings me to the important question in the case, which is, whether the plaintiffs, as assessors, had any jurisdiction over the person or property of the defendant, to impose an assessment, he being a minister of the gospel and not hav-

Prouser v. Secor.

ing real and personal estate exceeding the value of \$1500. Assessors are officers created by statute, with no powers or jurisdiction except what the statute confers. Their powers and duties are all prescribed in art. 2, ch. 13, part 1 of R. S. By § 8, between the first days of May and July, they shall proceed to ascertain by diligent inquiry the names of all the *taxable* inhabitants in their respective towns, and all the *taxable* property therein. By § 9 they are required to prepare an assessment roll, in which they shall set down in four separate columns, and according to the best information in their power, in the first column the names of all the *taxable inhabitants*, in the second the quantity of land to be taxed to each person, and in the third the value of such land.

Thus it will be seen it is made their duty by statute to ascertain who are taxable and who not, by diligent inquiry, and they have no authority to enter any person's name upon the assessment roll whose property is by law exempt from taxation, or to impose an assessment thereon. They have no jurisdiction whatever over such persons or their property. The assessment, when made, is a lien or incumbrance upon the land, in the nature of a judgment, upon which, after the levy of the tax, a warrant in the nature of an execution issues. The assessment of the value is a judicial act, upon which a common law certiorari will lie. (3 *Denio*, 119.) But to make the assessment legal, they must have jurisdiction of the particular case. If they transcend the limits of their authority, and undertake to assess property exempt by statute, they cease to be judges, and are responsible for all the consequences. (*Id.* 120.) It is a familiar principle, well settled and wisely adopted, that inferior tribunals are bound to see that their acts are within the scope of the authority which the statute confers upon them; and whenever they undertake to assume and exercise jurisdiction beyond that, they are not protected. (*Suydam v. Keyes*, 13 *John. Rep.* 444. *Borden v. Fitch*, 15 *Id.* 121. *Gold v. Bissell*, 1 *Wend.* 213. *Savacool v. Boughton*, 5 *Id.* 170.) The principle is fully recognized in all the cases. It is urged by the counsel for the plaintiffs in error that on

Prosser v. Secor.

making the assessment in question they were acting within the scope of their authority. That the defendant was a resident of their town and the owner of the property assessed, and they were bound to pass upon the question as to whether the defendant was a taxable inhabitant; and that having determined that he was, and imposed the assessment in pursuance of their duty, they are not responsible if it turns out that his property was exempt. This proposition would be sound if it were left to the assessors to determine who are and who are not the proper subjects of taxation, and what property should be exempt and what taxed. But this the legislature have determined, and the authority conferred upon the assessors is to inquire diligently and ascertain and assess such property and such only, as the legislature have declared taxable.

If the assessors could make a legal and valid assessment merely by determining that the owner was a taxable inhabitant, the statute exemption would be idle and worthless indeed. It would afford no shield to any one, and the assessor would become a lawgiver whose determinations would annul the statute. It must be quite apparent that the assessors could not, by any determination they have power to make, subject the property of any person to taxation which the law exempts. In determining whether they have jurisdiction or not, in a given case, assessors do not act judicially. No officer can acquire jurisdiction by deciding that he has it. In all such cases every officer, whether judicial or ministerial, decides at his peril. It may often be difficult for assessors to determine whether a person is or is not a taxable inhabitant, and operate harshly to make them responsible for erroneous decisions in certain cases. But the difficulty is no greater than is encountered in the discharge of the duties of every office. And a due regard to the security of private rights requires that the rule should be inflexibly maintained. Private rights would be rendered uncertain and insecure indeed, should it be left to the determination of the judge or magistrate to fix the bounds to his authority; and doubly so should it be held that such de-

The Farmers' Loan and Trust Company v. Carroll.

termination was in its nature judicial and the magistrate protected by it in the exercise of power or authority thus acquired.

The defendant being a minister of the gospel was not a taxable inhabitant, and the plaintiffs in error had no jurisdiction over him or his property, nor could they acquire any by any act or decision of their own. They must therefore be held responsible.

I am of the opinion that the justice very properly excluded the evidence offered by the defendants touching the plaintiff's moral character. It was not a question whether the plaintiff ought to have been a minister or priest, but whether he was such in fact. The statute makes no distinction between a moral and an immoral minister, in its exemptions. It has very wisely left the morals of the pastor to the care and scrutiny of his congregation. The proof offered was irrelevant.

Judgment affirmed.

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STEUBEN GENERAL TERM, September, 1849. *Maynard,*
Wells, and Marvin, Justices.

THE FARMERS' LOAN AND TRUST COMPANY and others vs.
CARROLL and others.

C. proposed to the Farmers' Loan and Trust Co. to create a trust with the company of certain land in the county of L. and other property in the city of R., the company to advance him \$75,000 in their certificates of trust running 20 years at an interest of five per cent. Before any arrangement between the parties was completed C. submitted a further proposition "to borrow from the F. L. & T. Co. \$95,000, and to convey in trust, to secure the same," real estate valued at \$190,853.90. A few days afterwards C. proposed to divide the trust, so as to make a trust in his own name of certain property estimated at \$163,794.40, and to receive thereon, in the company's certificates of trust, \$52,000, and to create a trust as executor of C. C., of other property estimated at \$87,059.50, and to receive thereon \$43,000 in similar certificates. The company thereupon consented to the creation of two distinct trusts, as proposed by

The Farmers' Loan and Trust Company v. Carroll.

C. Accordingly C., by a deed absolute on its face, expressing the consideration of \$52,000, and containing the usual covenants, conveyed the land in the county of L. to the company, in fee. On the same day the deed was given the parties entered into and executed certain articles of agreement and declaration of trust, whereby the company covenanted, promised and agreed that they would, in consideration of such trust, issue and deliver to C. their certificates of trust to the amount of \$52,000 payable to him or his assigns, and to bear an interest of 5 per cent, redeemable in 20 years. And it was agreed that C. should apply such an amount of the certificates as should be required, or of the proceeds thereof, in payment and liquidation of the liens and incumbrances on the land. The company covenanted to make sales, and to grant, execute and deliver all conveyances of the said real estate to purchasers, whenever authorized and requested by C., and to receive the purchase moneys. C. was to be permitted to make contracts for the sale or lease of the real estate, subject to the approval of the company. It was made the duty of the company to collect, upon C.'s request, all moneys to become due upon securities taken from purchasers and lessees; and they were authorized to make any such collections, or to make sales of the real estate, or any part thereof, at any time after two years, or sooner if necessary for the safety and indemnity of the company. The company were to appoint an agent resident in the county of L. to be approved of by C., with full powers to collect and receive on behalf of the company all moneys to become due upon contracts, bonds and mortgages given upon sales of land, and to deliver deeds, &c. It was also stipulated that all securities and conveyances, leases and sales to be made and entered into should be made to and with the company only, who were to receive all the moneys payable on such securities, &c. and to account for the same to C. C. agreed to pay and allow to the company interest at the rate of seven per cent for the said sum of \$52,000; the difference between the interest agreed to be paid by the company on their said certificates (5 per cent) and the interest agreed to be paid by C., viz: two per cent, being declared and agreed to be the only compensation, allowance, or commission to the company for undertaking and executing the trust. And in case of the non-payment of the annual interest at any time for 30 days after it should become due, the company were authorized to sell and convey such portion of the real estate as would suffice to pay such interest. It was agreed that the moneys and securities paid, received, and taken by the company under such trust should be held by them as a distinct and separate fund and trust, and that it should at no time be reduced or diminished below an amount at all times sufficient to redeem the said certificates of trust. And the capital of the company was also pledged for their redemption. It was also agreed that the company should, upon the request of C., take and receive on its own account, such of the bonds and mortgages as should be given by purchasers of portions of the real estate worth double the amount secured thereby, and to be approved of by the finance committee of the company; and that the amount of such securities should be passed to the credit of C. It was also provided that whenever the company should have received the said sum of \$52,000, with interest, they should come to an account and

The Farmers' Loan and Trust Company v. Carroll.

settlement with C. of the said trusts, and pay over the balance due to him, if any, &c. And C. covenanted that in case the trust property and securities should be insufficient to pay to the company the \$52,000 and interest, he would pay such deficiency, and that he would indemnify the company from all loss.

Similar instruments were executed by the parties in respect to the trust of \$43,000 to C. as executor. And thereupon the company issued to C. 95 certificates of trust, under the seal of the company, for \$1000 each, 52 of which were to C. in his own right, and 43 to him as executor. Each certificate certified that C. had deposited with the company, \$1000 in trust, for 20 years, which sum the company agreed to pay to C. or his assigns, with interest at the rate of 5 per cent, payable semi-annually. At the time the certificates of trust were issued by the company they were worth, in the market, less than their nominal value.

Held, 1. That the legal effect of the execution and delivery of the instruments was to constitute a *loan* by the F. L. and T. Co. to C., and to secure the payment thereof by the latter; and that such was also the understanding and intention of the parties at the time.

2. That although the conveyances by C. to the company were absolute in terms, and assumed to convey the entire fee, yet as the agreements executed by the parties at the same time showed that they were intended only as securities in the nature of mortgages for the repayment of the loan of the certificates, that they were to be considered as mortgages.

3. That the parties, by the instruments and agreements in question, constituted neither a valid *trust* nor a *power in trust*, which could be lawfully executed by the company with the aid of a court of equity.

4. That the instruments could not be sustained as *covenants* on the part of C. to convey the lands when the company should dispose of them, or have a right to dispose of them, in order to pay the principal and interest of the loan.

5. That the agreement could not be enforced as a loan, 1st. Because the company did not possess the power of making loans; and 2d. Because the loan, and all the securities relating to it, were illegal and void as being in violation of the *usury laws*.

6. That the transaction was *usurious* upon its face, in making a difference of two per cent between the interest to be paid by the company upon their certificates, and that agreed to be paid by C. In other words that it was *per se* usurious.

7. That the arrangement being for a loan, upon usurious interest, and the certificates issued by the company being under seal, the holders or assignees of such certificates took them *cum onere*, chargeable with notice of all the material facts connected with their original concoction and subsequent mutations.

8. That as such certificates did not possess the ingredients of commercial paper, that fact was sufficient to put all persons dealing in them upon inquiry, and deprive the assignees thereof of any protection as innocent or *bona fide* holders.

The nature and properties of *trusts* considered and discussed.

Where a corporation relies upon a grant of power from the legislature, for authority to do an act, it is as much restricted to the *mode* prescribed by the statute, for its exercise, as to the thing allowed to be done. *Per WELLES, J.*

Distinction between an *estate in trust* and a *power in trust*.

The Farmers' Loan and Trust Company v. Carroll.

There can be no power in trust independent of the idea of a trust; i. e. there can be no power in trust without an appointee or beneficiary, other than the donee of the power.

In all cases of a loan, where it appears, upon the face of the transaction, that the lender is in any manner to receive more than the legal rate of interest, as a compensation for forbearance upon the thing loaned, whatever the thing may be, it is usury *per se*. *Per WELLES, J.*

The doctrine of subrogation is a doctrine which prevails only in equity; and it applies only to lawful and meritorious transactions.

Where a transaction is void for usury, no one who has been connected with the transaction, or who stands chargeable with notice, is entitled to any benefit from any thing connected with, or growing out of it. *Per WELLES, J.*

IN EQUITY. This case came before the court upon pleadings and proofs, in pursuance of an order made at special term directing the hearing to be had at general term. The facts, so far as are necessary to be stated in order to understand the opinion of the court, were substantially as follows: On the 9th day of December, 1837, the defendant Charles H. Carroll wrote to the president of the Farmers' Loan and Trust Company as follows, viz.:

"New-York, Dec. 9th, 1837.

To Mr. Curtis, president of the Farmers' Loan Company.

SIR. I wish to create a trust with your company of about 2800 acres of land in Livingston county, in the state of New-York, and of certain property in the city of Rochester, all of which will hereafter be more particularly described, as well as the objects of the trust.

Should your company accept of the trust, I wish them to advance me, in their certificates running twenty years at 5 per cent, interest semi-annually, seventy-five thousand dollars, (\$75,000.)

The property to be included in the trust, to be estimated by disinterested appraisers at double the amount advanced in certificates, and the title to be made clear and indisputable, and free from incumbrances.

Will you do me the favor of answering this proposition as soon as the action of your company can be had thereon.

Yours, resp'y. (Signed) C. H. CARROLL.

The Farmers' Loan and Trust Company v. Carroll.

P. S. The above application was made to your late president, the early part of last winter, and again last spring, and by his advice not presented to your company at either time, for reasons then satisfactory; but with an assurance from him that whenever the company commenced extending their business, that I should have his assistance in making the negotiation.

Yours, &c. C. H. CARROLL."

After the trust committee of the company had had this letter under consideration, and had made a report to the directors, the president returned to Carroll the following answer, viz.:

*"Office of the Farmers' Loan and Trust Company,
New-York, December 20th, 1837.*

C. H. CARROLL, Esq.

DEAR SIR: Your favor of the 9th inst. proposing to make a trust with the Farmers' Loan and Trust Company was duly received and came up this day before the trust committee. It is understood by the committee that you propose to make a trust of about 2800 acres of land (principally improved) in Livingston county, and certain property in the city of Rochester, together of sufficient amount to authorize the company in issuing their liability for \$75,000. The committee received your application favorably, and a resolution was passed that the appraisalment of the proposed property be referred to James Wadsworth, Phineas L. Tracy, James Seymour and Harvey Ely, Esquires, and unite with you in respectfully soliciting those gentlemen to act in the affair. Yours respectfully,

LEWIS CURTIS, Pres't."

At a meeting of the board of directors held on the 29th of December, 1837, an entry was made in their minutes as follows:

"A proposition of a trust by C. H. Carroll, Esq., of 2800 acres of land in Livingston county, and of certain property in Rochester, was submitted as partially acted upon by the trust committee, was approved, and was referred back to that committee, with power to complete the same."

The Farmers' Loan and Trust Company v. Carroll.

Before any arrangement between the parties upon the subject was completed, Carroll, on the 21st day of February, 1838, submitted the following further proposition, viz.

"Charles H. Carroll proposes to borrow from the Farmers' Loan and Trust Company \$95,000, and to convey in trust to secure the same,

Landed property, valued at	\$143,283,90
Rochester property, valued at	47,570,00

New-York, Feb'y 21, 1838.	\$190,853,90
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L. W. CURTIS, Esq. Pres't.	C. H. CARROLL."
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At a meeting of the trust committee of the board of directors of the company, held on the 7th of March, 1838, the following communication was received from Carroll, and the following proceedings had thereon by the committee, viz.:

"Charles H. Carroll proposes to divide the trust he is about to create with the Farmers' Loan and Trust Company, on which they have agreed to advance him \$95,000, in certificates upon property in his own name, estimated at \$103,794,40, and upon property of the estate of Charles Carroll, deceased, \$87,059,50, so as to make a trust in his own name, of the property estimated at \$103,794,40, and to receive thereon, in certificates \$52,000; and to create a trust as executor of Charles Carroll, of the property estimated at \$87,059,50, and to receive thereon in certificates \$43,000.

March 7th, 1838.	CHARLES H. CARROLL."
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"Whereupon it was Resolved, that two distinct trusts shall be created as requested by Mr. Carroll, one of them between him, individually, and the company, for \$52,000, founded upon — acres of land in the county of Livingston; and the other between him, as executor of the will of said Charles Carroll, deceased, and the company, for \$43,000, founded upon real estate in Livingston county and Rochester. Provided, said Carroll shall execute an instrument by which the company will be entitled to make good out of the estate conveyed by him to the company individually, any loss or deficiency which may arise in his trust as executor.

The Farmers' Loan and Trust Company v. Carroll.

"The counsel of the company submitted the drafts of two several articles of agreement and declarations of trust, prepared in conformity with the foregoing resolution.

"Resolved, That said articles be severally approved and engrossed, and the officers of the company are authorized to execute the same."

In pursuance of the foregoing negotiations and proceedings between the company and Carroll, and after measures had been taken to have the lands proposed to be conveyed in trust, appraised, and searches and examinations made as to title and incumbrances, and previous to the sixth day of April, 1838, and on or about the 12th day of March of that year, the defendant Charles H. Carroll, by deed bearing date on the first day of March, 1838, conveyed in fee to the Farmers' Loan and Trust Company, certain real estate situated in the county of Livingston. The deed contained the usual covenants of seisin, for quiet enjoyment, against prior incumbrances, for further assurances, and of warranty. The consideration expressed in this conveyance was \$52,000. It was duly acknowledged on the 12th day of March, 1838, and recorded in the office of the clerk of Livingston county, on the 20th March, 1838, as a deed, and on the 30th April, 1842, as a mortgage.

Cotemporaneously with the execution of said deed of conveyance, the parties thereto entered into and duly executed an instrument in writing in the words and figures following, viz :

"Articles of agreement and declaration of trust, made and entered into this first day of March, in the year of our Lord one thousand eight hundred and thirty-eight, by and between the Farmers' Loan and Trust Company of the first part, and Charles H. Carroll of the town of Groveland, in the county of Livingston, and state of New-York, of the second part, witnesseth, whereas the said party of the second part is the owner of certain real estate situate in the said county of Livingston; and whereas there are several charges, incumbrances or liens now outstanding and existing upon said real estate; and whereas the said Charles H. Carroll being desirous of having the said

The Farmers' Loan and Trust Company v. Carroll.

real estate converted into cash and available securities, by the sale of the same in suitable parcels and at convenient times, the said Farmers' Loan and Trust Company have agreed to accept a conveyance of the said real estate, and assume, perform and execute for and on account of the said Charles H. Carroll, the trust hereby declared and agreed upon between them, in relation to the said real estate; and whereas, in pursuance of the said agreement, the said Charles H. Carroll hath, on the day of the date hereof, executed and delivered a conveyance in fee of the said real estate to the said the Farmers' Loan and Trust Company; now this agreement witnesseth that the conveyance of the said real estate as aforesaid is made by the said Charles H. Carroll, and accepted by the said the Farmers' Loan and Trust Company, upon the special trusts and agreements hereinafter particularly declared of and concerning the same. And the said parties hereto do hereby covenant, promise and agree with each other as follows, to wit: *First.* The said the Farmers' Loan and Trust Company do hereby covenant, promise and agree that they will, in consideration of the aforesaid trust, and with a view to enable the said Charles H. Carroll to pay off and satisfy all the charges, liens or incumbrances upon the said real estate, immediately after the execution of this agreement, execute and deliver to the said Charles H. Carroll their certificates of trust, in the usual form adopted by them, to the amount in the aggregate of fifty-two thousand dollars, to be made payable to him or his assigns, the said certificates of trust to bear an interest of five per centum per annum, payable half-yearly, redeemable in twenty years. *Second.* It is understood and hereby agreed, that the said Charles H. Carroll shall and will apply such an amount of the said certificates as is required for that purpose, or of the proceeds arising from any disposition he may make of the same, in payment and liquidation of the said charges, liens or incumbrances upon the said real estate. *Third.* The said the Farmers' Loan and Trust Company are to make sales and grant, execute and deliver all conveyances of the said real estate and premises, to purchasers thereof, whenever duly authorized and requested by the said Charles

The Farmers' Loan and Trust Company v. Carroll.

H. Carroll or his assigns, the said the Farmers' Loan and Trust Company to decide in the first instance upon the sufficiency, and to receive the consideration moneys obtained from such purchasers as hereinafter provided, it being expressly understood and agreed that the said the Farmers' Loan and Trust Company shall not be required to give or enter into any covenants of warranty in respect to the title to said real estate; but if required by the said company, or the purchasers to said real estate, or either of them, the said Charles H. Carroll or his assigns, shall unite in the execution of said conveyance, and shall therein give and enter into the usual and customary covenants of warranty. *Fourth.* The said Charles H. Carroll or his assigns, is to be permitted to make contracts for the sale or lease of the real estate, or parts thereof, in such manner as he may deem most for his interest, provided such sales and leases do not impair or diminish the security of the said the Farmers' Loan and Trust Company, and are approved of by the said company, and also subject to the right of the said the Farmers' Loan and Trust Company, to receive and take all moneys and securities which may arise from any such contracts or sales, to be held and accounted for by them until a final settlement of said trust is had and made between them and the said Charles H. Carroll or his assigns. *Fifth.* It shall be the duty of the said the Farmers' Loan and Trust Company to collect by legal process or otherwise, upon the request of the said Charles H. Carroll, all moneys which may from time to time become due upon bonds and mortgages, leases and contracts, taken and received by said company, from purchasers and lessees of said real estate, and shall also be authorized to make any such collections, or make any sale or sales of the whole or any part of the said real estate and premises, at such price or prices as the company may deem proper at any time after ten years from the date hereof, and at any time sooner, should it become necessary for the safety and indemnity of the said the Farmers' Loan and Trust Company. *Sixth.* The said the Farmers' Loan and Trust Company shall, from time to time, appoint an agent, resident in the county of Livingston, to be approved of

The Farmers' Loan and Trust Company v. Carroll.

by the said Charles H. Carroll or his assigns, with full powers, and whose duty it shall be to collect and receive, on behalf of the said the Farmers' Loan and Trust Company, all moneys due or to become due upon any contracts for the sale of lands, and upon any bonds and mortgages which may be given upon any sale of lands, and to deliver deeds for said lands, executed by the said the Farmers' Loan and Trust Company, to the holders of contracts, upon receiving from the purchasers the amount of purchase money then remaining due or agreed to be paid thereon, or upon receiving bonds and mortgages on the premises so conveyed, for a portion of the purchase moneys as may be agreed upon and approved by the said the Farmers' Loan and Trust Company, the proceeds arising from all such collections by said agent, to be forthwith accounted for and paid over to the said the Farmers' Loan and Trust Company, in such manner as the said company shall from time to time direct. *Seventh.* All bonds, mortgages, contracts and other securities, and all conveyances, leases and sales made, executed and entered into, under and by virtue of this agreement, shall be made to and with the said the Farmers' Loan and Trust Company only, who are to receive all moneys with legal interest thereon, payable and collected upon such securities and sales to be made and received by the said the Farmers' Loan and Trust Company, and to be accounted for by them to the said Charles H. Carroll or his assigns, upon the closing of the said trust as aforesaid. *Eighth.* The compensation to be allowed to any agent appointed by the said the Farmers' Loan and Trust Company, under and by virtue of the sixth article of this agreement, shall be fixed by said company, which compensation, together with all other necessary and reasonable expenses and payments made on account of the faithful execution of said trust, including taxes upon the said real estate, shall be paid and deducted by the said the Farmers' Loan and Trust Company, in the first instance, out of any moneys which may be received by them on account of said trust, which payments, with the interest thereon, shall be allowed to the said the Farmers' Loan and Trust Company by the said Charles H. Carroll

The Farmers' Loan and Trust Company v. Carroll.

and his assigns, on the final closing of the said trusts. *Ninth.* The said the Farmers' Loan and Trust Company hereby stipulate and agree to execute and fulfil any outstanding leases heretofore made and entered into by the said Charles H. Carroll, for the leasing of parts of said real estate, according to the terms thereof. *Tenth.* The said Charles H. Carroll shall pay and allow, annually, to the said the Farmers' Loan and Trust Company, interest at the rate of seven per centum per annum upon the said sum of fifty-two thousand dollars, such interest to commence from the day of the delivery of the certificates of trusts, to be executed by the said the Farmers' Loan and Trust Company, as aforesaid, the difference between the interest paid by the said the Farmers' Loan and Trust Company upon their said certificates of trust, and the interest to be allowed and paid by the said Charles H. Carroll, as aforesaid, being two per centum, is hereby declared and agreed between the parties hereto, to be the only compensation, allowance or commission, to the said the Farmers' Loan and Trust Company, for undertaking and executing the trust hereby created and to be performed by them; and it is hereby expressly understood and agreed, that should the said annual interest, or any part thereof, remain unpaid for thirty days after the period when the same ought by the terms hereof to be paid, the said the Farmers' Loan and Trust Company may at their option sell and convey, at any time after the expiration of said thirty days, at public or private sale, such portion of said real estate as will be sufficient to pay and satisfy such unpaid interest. *Eleventh.* The moneys and securities paid, received and taken by the said the Farmers' Loan and Trust Company under and by virtue of the trusts hereby created, shall be held by them as a distinct and separate fund and trust, apart from all other trusts assumed and taken by them, and the said company hereby covenant for themselves and their successors, that said trust moneys and securities shall at no time be diminished or reduced below an amount at all times sufficient to redeem the certificates of trust granted to the said Charles H. Carroll, as aforesaid; and further, that the capital of the said the Farmers' Loan and Trust Com-

The Farmers' Loan and Trust Company v. Carroll.

pany shall at all times stand pledged, and hereby is pledged for the faithful payment and discharge of the said certificates of trust, and the interest therein agreed to be allowed, at the several times when the said certificates and interest moneys shall be redeemable and payable by the terms thereof. *Twelfth.* It is understood and agreed that the said the Farmers' Loan and Trust Company shall, upon the request of the said Charles H. Carroll, or his assigns, assume, take and receive, on the account of said company, such of the bonds and mortgages as shall be given by purchasers of portions of the said real estate; the said real estate so mortgaged shall be valued by two appraisers to be selected by the said the Farmers' Loan and Trust Company, as worth at least double the amount to be loaned upon the same, and to be approved of as sufficient and adequate security by the finance committee of said company. The bonds to be payable within ten years from the date hereof, at seven per cent interest per annum, payable annually, and no one mortgage is to exceed in amount the sum of ten thousand dollars, and when taken and received as herein above mentioned, the amount thereof with the interest which may have accrued thereon, is to be passed to the credit of the said Charles H. Carroll, or his assigns. *Thirteenth.* Whenever the said the Farmers' Loan and Trust Company have received the said sum of fifty-two thousand dollars, with the interest thereon, payable annually as aforesaid, either from the sales of said real estate, from bonds and mortgages or otherwise, or by the holding of bonds or mortgages executed to them, and which they may assume and take on their own account, under the twelfth article of this agreement, or shall receive payment of the full amount due to them by the said Charles H. Carroll, at any time, the said the Farmers' Loan and Trust Company shall, upon the request of the said Charles H. Carroll or his assigns, immediately thereafter come to an account and settlement of the trusts hereby created, and shall thereupon convey, assign, transfer, deliver and pay over to the said Charles H. Carroll, or his assigns, the remaining unsold lands, bonds and mortgages, and other securities, and all moneys, contracts for sale, and all evi-

The Farmers' Loan and Trust Company v. Carroll.

dences of title in their hands, relating to said trust, the said Charles H. Carroll, or his assigns, at the time of such transfer, executing and delivering a full and complete release and discharge to the said the Farmers' Loan and Trust Company, in relation to the execution of said trusts; and should the said real estate, mortgages and other securities at any time prove to be insufficient to reimburse the said the Farmers' Loan and Trust Company the said amount of fifty-two thousand dollars, with the interest thereon, the said Charles H. Carroll doth hereby covenant, promise and agree that he, his executors and administrators will well and truly pay or cause to be paid any such deficiency, and will at all times indemnify and save harmless the said the Farmers' Loan and Trust Company of and from all loss or damage by reason of or on account of the said trust and the execution of these presents. In witness whereof, the said the Farmers' Loan and Trust Company have caused their corporate seal to be hereto affixed, and the same to be signed by their president and attested by their secretary, and the said Charles H. Carroll hath hereunto set his hand and seal the day and year first above written.

LEWIS CURTIS, Pres't. [L. S.]

R. K. DELAFIELD, Sec'y.

C. H. CARROLL." [L. S.]

Sealed and delivered in the
presence of Wm. P. Powers,
W. G. Wood.

This instrument was duly acknowledged, and was recorded in the clerk's office of Livingston county, on the 30th April, 1842, in the records of deeds, and also at the same time in the records of mortgages.

At the same time of the making and execution of the foregoing deed and instrument in writing, the said Charles H. Carroll, as executor of the last will and testament of Charles Carroll deceased, by two deeds of the same date as the former, conveyed to the said Farmers' Loan and Trust Company certain other real estate, situated in the counties of Monroe and Livingston. These last two deeds were expressed to be for the

The Farmers' Loan and Trust Company v. Carroll.

consideration of \$43,000, and conveyed the premises therein described to the Trust Company in fee, and contained covenants for quiet enjoyment and against prior incumbrances. They were in all respects alike, excepting that one of them embraced lands in Livingston county, and the other in Monroe county. They were acknowledged by the grantor, on the 12th March, 1838, and the one for lands in Monroe county, recorded in the clerk's office of that county, as a deed, on the 19th day of March, 1838, and as a mortgage, on the 30th April, 1842; and that for lands in Livingston county, in the clerk's office of the latter county, as a deed, on the 20th of March, 1838, and as a mortgage on the 14th of May, 1842.

At the time of the execution of the last two deeds the parties thereto executed another instrument in writing, of the same date with the deeds, in which the said Charles H. Carroll is described as executor of, &c. of the said Charles Carroll deceased, and which is similar in its provisions to the one above set forth, except that it relates to the last two conveyances, and the lands therein described, and provides for the issuing by the company of certificates of trust to the amount of \$43,000, and Carroll subscribed it as executor. This instrument was also recorded in Monroe county, in the records of deeds, and also of mortgages, on the 30th of April, 1842, and in like manner, in Livingston county, on the 14th of May of the same year.

At the same time of the making and executing the said deeds and instruments in writing, the said Charles H. Carroll made and executed under his hand and seal, and delivered to the said Trust Company a covenant bearing date on the said first day of March, 1838, reciting therein the said deeds and instruments in writing, and also reciting that the said trust, created by said Carroll as executor of said Charles Carroll deceased, was agreed to and created upon the condition and understanding that should the property conveyed by him as executor as aforesaid, to the said company, prove insufficient to reimburse the said company the said sum of \$43,000, advanced to him as such executor, together with the interest thereon, the said company should be entitled to repay themselves such deficiency

The Farmers' Loan and Trust Company v. Carroll.

out of the trust premises conveyed to them by the said Charles H. Carroll individually, after refunding to the said company the said sum of \$52,000, advanced by them in their said trust certificates, and the interest thereon, and he the said Charles H. Carroll in and by said covenant, in consideration of the premises and of one dollar to him in hand paid, thereby for himself and his heirs and assigns, did covenant, consent, promise and agree to and with the said company, that the said company should and might take, hold and retain and enjoy the premises conveyed by him individually to them as aforesaid, until the winding up and final settlement of the trust created by him with them as executor as aforesaid, and should, and might in the event of their sustaining any loss by reason of said last mentioned trusts, reimburse themselves out of the premises conveyed to them by him individually, as aforesaid; and he, the said Charles H. Carroll, did also thereby further covenant, promise and agree that he would at all times indemnify and save harmless the said Farmers' Loan and Trust Company of and from all loss or damage which they might sustain or be put to by reason of the creation of the said trust with him as executor as aforesaid.

In the certificates of individuals to whom reference on the subject was had of the valuation of the property to be conveyed, furnished to the company by Carroll, during the previous negotiations, the transaction is spoken of as a loan. The one respecting the lands in Livingston county is headed as follows, viz:

"Charles H. Carroll, of the town of Groveland, in the county of Livingston and state of New-York, is an applicant to the Farmers' Loan and Trust Company, for a loan of \$1,641,95, upon the following premises, situated in the towns of Groveland and Sparta, in the county of Livingston, as will appear by reference to the maps hereto annexed, viz: " Then follows a specification of the different parcels of land with the valuations, and concludes as follows, viz:

The Farmers' Loan and Trust Company v. Carroll.

"We, William Finley, of the town of Geneseo, in the county of Livingston, William H. Spencer, of the town of York, in the county of Livingston, and Simeon Cummings of the town of Batavia, in the county of Genesee, do certify that we are well acquainted with the above described premises, having made particular examinations of the same, and have valued the several parcels thereof at the prices above stated. We have valued the same upon a cash sale, and we have no hesitation in expressing our entire confidence in the sufficiency of said property to secure in any event the loan of \$71,641.95, proposed to be obtained of the Farmers' Loan and Trust Company, upon the said 2969.88 acres of land, or the sufficiency of any of the above named pieces of land to secure a loan in the same proportion to the valuation thereto annexed.

WILLIAM FINLEY, }
WM. H. SPENCER, } *Appraisers.*
S. CUMMINGS.

Dated Groveland, January 13th, 1838."

The certificate by the appraisers of the property in Monroe county, also speaks of the transaction as a loan, in a similar way.

Upon the execution of the foregoing several deeds and instruments in writing, the Farmers' Loan and Trust Company issued ninety-five certificates of trust, for \$1000 each, fifty-two of which were to Charles H. Carroll in his own right, and the remaining forty-three were to him as executor, &c. The following is the form of those to Carroll in his own right, viz:

"*United States of America*, State of New-York. Farmers' Loan and Trust Company. Capital \$2,000,000. Certificate of trust. Interest five per cent. per annum. (L. Cert. No. —.) (L. \$1000.) This certifies that Charles H. Carroll has deposited with the Farmers' Loan and Trust Company, the sum of one thousand dollars, in trust, which sum is to remain in trust with the said company, for the period of twenty years, from the 1st March, 1838, ending on the 1st March, 1858, and shall be irredeemable for that period.

The Farmers' Loan and Trust Company v. Carroll.

Interest at the rate of five per cent. per annum, shall be paid by the said company, semi-annually, on the above mentioned sum of one thousand dollars, to the said Charles H. Carroll, or to his assigns, on presentation of the coupons hereto annexed. On the 1st day of March, 1858, the principal sum above mentioned, and the interest then due, shall be paid to the said Charles H. Carroll, or to his assigns.

In witness whereof the said company have caused this certificate of trust to be attested in their behalf, by their president and secretary, and their common seal to be [L. s.] hereunto affixed, at their office, in the city of New-York, this first day of March, in the year of our Lord one thousand eight hundred and thirty-eight.

LEWIS CURTIS, President.

R. K. DELAFIELD, Secretary."

The semi-annual instalments of interest were provided for by forty *coupons*, attached to each certificate, varying from each other only in the statement of the time when the interest would become due for which they were respectively designed. The following is the form of the *coupon* for the last instalment of interest, the rest corresponding except in the particular mentioned, viz :

"To the cashier of the Phenix Bank of New-York. Pay the bearer twenty-five dollars, being half a year's interest, due first Monday in March, 1858, on a certificate of the Farmers' Loan and Trust Company, No. —, for one thousand dollars.

L. \$25.

R. K. D. Sec'y."

At the time of the execution of the deeds by the said Charles H. Carroll in his own right and as executor as aforesaid, some of the lands described therein were encumbered by two mortgages given by said C. H. Carroll, one to Luke Tiernan of Baltimore, dated October 7, 1825, upon which was due over \$25,000, and the other to Sarah Brinton, of Philadelphia, dated March 1, 1832, upon which was due over \$6000. The mortgage to Tiernan was executed by the defendant Carroll, as executor, &c. and was given upon lands of which the testator

The Farmers' Loan and Trust Company v. Carroll.

Charles Carroll died seised, and to secure a debt owing by him, in his lifetime, to the said Tiernan.

After the execution by the Trust Company of the \$95,000 of trust certificates, and on the 5th day of April, 1838, they were placed in the hands of one Powers, an agent of the Trust Company, who thereupon, in company with the defendant C. H. Carroll, went from the city of New-York to the city of Baltimore, for the purpose of receiving discharges of the above mentioned mortgages, taking the certificates with him. The certificates were placed in Powers' hands by the Trust Company, with instructions to deliver them to said Carroll, on receiving from him the necessary discharges of the incumbrances, at the same time Carroll executing to the company a receipt for the certificates. While at Philadelphia, on their way to Baltimore, Carroll procured the mortgage to Mrs. Brinton to be satisfied, which mortgage, with the certificate of satisfaction in due form, was delivered to Powers by Carroll. Failing to procure a satisfaction of the Tiernan mortgage on this occasion, Powers and Carroll returned to New-York with the certificates, which were soon after put into the hands of Auguste Belmont, the agent in New-York, of the house of N. M. Rothschild & Son, of London, to be remitted to the house in London for sale; Belmont advancing sixty per cent. on their par value, and paying the amount of such advance to the Trust Company in the name and for the account of Carroll, the latter stipulating to leave with the company \$26,000 thereof, which should not be drawn for, until the Tiernan mortgage was assigned to the company, which \$26,000 was left by Carroll with the company for the payment of what might be due on that mortgage.

The certificates were forwarded by Belmont to London, to be sold in market according to Carroll's instructions, at the limit of the London price, 83 per cent. on their nominal amount or better, within forty-five days after their receipt, and at the expiration of that time, if not sold, at the best rate obtainable in the market. The certificates were sold by the Rothschilds in the course of the summer of 1838, and the amount paid into the company by Belmont, for the benefit of Carroll, which in-

The Farmers' Loan and Trust Company v. Carroll.

cluding the advance of sixty per cent. was \$82,575.53. This was the whole proceeds of the sales, after deducting expenses, commissions, &c. and which was paid by the company upon Carroll's drafts, deducting the amount of the Tiernan mortgage, which had been on the 5th of May, 1838, assigned to the company.

The defendant, C. H. Carroll, was appointed by the company their agent in Livingston county, under the 6th article in the agreements called declarations of trust. He paid to the company the interest on the nominal amount of the trust certificates, \$95,000, up to the 1st September, 1839, and nothing has been received by the company on account of the said transactions with Carroll at any other time before or since. On the 16th of August, 1842, the Trust Company, by their secretary, wrote Carroll, enclosing an account of interest, which it was claimed, would be due the company on the first of September following, and notifying him that payment of the amount then to become due, would be required on or before the 15th of that month, in default of which an order would be immediately thereafter issued for its collection by legal proceedings, and his powers as agent of the company would be discontinued. The amount of interest which it was claimed by the company would be due from Carroll on the first of September, 1842, was \$19,950.

Not hearing from Carroll in reply, the company, on the 14th of November following, wrote him again, requesting payment of the said \$19,950, interest due the first of September previous, to which they received an answer as follows, viz :

" Groveland Center, Nov. 23, 1842.

ROBERT C. CORNELL, Esq.

President of Farmers' Loan and Trust Company :

SIR, I have received your letter of Nov. 14th, inst., by Robert W. Lowber, Esq., with accounts accompanying same, from which you claim a balance due from me to your company, of nineteen thousand nine hundred and fifty dollars, and request me to pay the same to Mr. Lowber.

The Farmers' Loan and Trust Company v. Carroll.

I deny, as I have heretofore done, any indebtedness to your company, and again request that you will either desist from setting up any claims against me, or at once proceed to adjudicate the same.

I am, sir, very respectfully, your obedient servant,

C. H. CARROLL."

The company thereupon revoked Carroll's powers, and appointed another agent in his place, under the said 6th article of the agreements or declarations of trusts. Carroll retained the possession of the lands, and refused to give up the possession to the company, or their new agent.

On the 14th of December, the company advertised a portion of the lands embraced in the deed made to the company by Carroll in his own right, to be sold at the court house in Geneseo, Livingston county, on the 6th of January following, for the payment of the interest due. This sale was prevented by injunction from the court of chancery, upon a bill filed by Carroll.

The plaintiffs, Carpenter, Paull and Chapman, are purchasers and holders of a portion of the trust certificates, residing in London. The bill in this case, after setting forth the foregoing, with various other matters, charges and pretences, not necessary to be mentioned, concludes with the following prayer, viz:

"And that the said deeds and declarations of trust, and each of them, may be decreed and declared to have been and to be effectual between the said company and the said Charles H. Carroll, to establish and create trusts valid and operative in law, by and between them and every other person or persons, and capable of being executed and enforced by the said company as such trustees, according to the terms thereof respectively, or by and with the aid, and under the sanction and decree of this honorable court; and that the legal titles of the said lands and premises in the said deeds and declarations of trust mentioned, may be declared and decreed to have been and to be vested in the said company under the said deeds and declarations of trust,

The Farmers' Loan and Trust Company v. Carroll.

for the purposes and objects therein specified ; and that the said company may be permitted to sell the said lands and premises, or that the same may be decreed to be sold by and under their direction, or of one of the masters of this court, for the purpose of satisfying, to your orators, their costs of this bill of complaint to be taxed, and the amount so due to the said company for interest, as hereinbefore stated, and the principal when the same shall become due, and the interest that may accrue to the said certificate holders, and each of them, or to the said company in trust for them ; and that upon such sale, a deed or deeds may be executed by the said master (if the same shall be under his direction, in which deed the said company hereby offer to unite) or by the said company, which deed or deeds shall be decreed to convey an indisputable title to the purchaser or purchasers of such premises, and every part thereof.

Or that the said deeds and declarations of trust may be declared to have been created in, and to have invested your orators, the said company, with a power or powers in trust for the sale of the said land and premises on default of payment of the said interest, and for the said advances so made by your orators and the other holders of the said certificates, and for the sums paid, and procured to be paid by the company, upon and for the said mortgages, and the other liens, charges and incumbrances hereinbefore mentioned ; and that it may also be declared and decreed that such sales shall now take place, such default having actually occurred, and the same being necessary for the safety and indemnity of the said company ; and that said sale be made by the said company, by or under the authority of this court, or by or under the authority of one of the masters of this court ; and, that on such sale, a deed or deeds may be given by the said company, or by the said master, if the said sale shall take place under his direction, in which deed the said company offer to unite, which said deed or deeds shall be declared and decreed to convey and confer a valid title to the said lands and premises, free from any lien, claim or incumbrances by judgment, decree, or otherwise, against the said Charles H. Carroll, subsequent to the execution and delivery

The Farmers' Loan and Trust Company v. Carroll.

of the said deeds and declarations of trust ; and that from the proceeds of such sale, your orators, together with all the said certificate holders, may be paid the amount due, and to become due to them respectively, as hereinbefore mentioned, and the costs of this bill of complaint ; or if it shall seem to your honor that the said deeds and declarations of trust amount to mortgages, and it shall be agreeable to equity and good conscience, then that an account may be taken of the several sums of money now being and remaining due to the said company, and the amount to become due to them and the said certificate holders, for principal and interest, according to their respective rights and interests under the said declarations of trust ; and that the said Charles H. Carroll may be decreed to pay the same, together with the costs of this bill of complaint, at a short day, to be appointed by this court, and that your orators, the said company, as trustees for the said certificate holders, may be decreed to be substituted to the place of the said Sarah Brinton and the said Luke Tiernan in respect to the mortgages hereinbefore mentioned, and the several sums of money due thereon, and to the said liens, charges, or incumbrances and debts against the estate of the said Charles Carroll, deceased, and to all sum or sums of money due thereon, and that an account may be taken of the same by one of the masters of this court, and that he, the said Charles H. Carroll, may be decreed to pay the same at such short day as aforesaid, or in default thereof, that the defendants to this bill of complaint hereinafter named, and all persons claiming or to claim under them and each of them, may be absolutely barred and foreclosed of and from all right and equity of redemption of and in the said lands and premises and every part thereof, your orators, the said company, hereby offering upon payment of the money so due and to become due to them and to the said certificate holders respectively, or upon the same being paid into court for their use, together with the costs of this suit, to unite and concur in all necessary acts and deeds for conveying the said lands and premises, or any part thereof, in such manner as this court shall be pleased to direct, if it be necessary so to do, or that all and

The Farmers' Loan and Trust Company v. Carroll.

singular the said lands and premises may be sold under the order and decree of this court, and out of the moneys arising from the sale thereof, your orators may be paid, the costs of this bill of complaint, and the full amount of their advances and payments on account of the said trusts, liens, mortgages, charges and incumbrances, and the principal and interest due and to become due to them and the said certificate holders respectively, according to their several interests as hereinbefore stated, your orators, the said company, hereby offering to unite in any conveyance of the said lands and premises, or any part thereof, under the direction of this court.

Or that the said deeds and declarations of trust may be decreed and declared to have been, and to be valid as instruments for the creation of trusts at law and in equity, and capable of being executed by your orators, the said company, under the direction of this court, and that the same may be so executed and carried into effect under the decree of this court, in such manner as may seem meet and agreeable to equity and good conscience.

Or that the said lands and premises may be declared and decreed to be held by your orators, absolutely free, clear, and divested of any and all claim or demand, right, title, or interest of any of the defendants hereinafter named ; and that your orators, the said company, have full power and authority to sell the same, or that it may be referred to one of the masters of this court to take and state an account of the amount now due, and hereafter to become due, to the said company, and to the said certificate holders, and each of them, under and by virtue of the covenants in the said declarations of trust contained, and to which they are respectively entitled, upon the facts hereinbefore stated, with interest thereon ; and that the said lands and premises may be sold to satisfy the same, under a decree of this court, your orators, the said company, offering to unite in the conveyances to be given on such sale, if necessary.

And that an account may be taken of all sums and amounts of money received, and for which the said Charles H. Carroll has become liable under the said declarations of trust, and the

The Farmers' Loan and Trust Company v. Carroll.

said powers of attorney for or on account of any contracts, sales, and conveyances of the said lands and premises, and the rents, issues and profits thereof; and that he, the said Charles H. Carroll, and the said William T. Carroll, and Robert Van Rensselaer, may be decreed to pay the amount which shall be found due on such accounting, with interest, to the said company, on account of and as a part of such trust estate, to be held by them, as well for their protection and indemnity as for the said certificate holders and each of them.

And that the said Charles H. Carroll may, by the order and injunction of this honorable court, be enjoined and restrained from collecting and receiving any sum or sums of money for or on account of the said lands and premises, and from any sales, contracts or agreements made, or to be made in relation thereto, or to any part thereof, and from receiving, or in any way interfering with the rents, issues and profits thereof, and of every part thereof, and from selling, disposing of, contracting to sell, conveying, or in any way incumbering the said lands and premises, and every part thereof, until the further order of this court; and that a receiver or receivers of the said lands and premises, and of the said rents, issues and profits thereof, and the amount due and to become due upon contracts for the sale thereof, may be appointed by this court, during the pendency of this bill of complaint, and that the said Charles H. Carroll may be compelled to assign and deliver to the said receivers upon oath, under the directions of a master of this court, all contracts, agreements, leases and demises of or in relation to the said lands or any part thereof, and all sum and sums of money due or to grow due thereon; and that your orators may have such other or further relief, with any or all the preceding kinds of relief as to your honor shall seem meet and agreeable to equity and good conscience, or that your orators may have some, or one, or all the kinds of relief hereinbefore prayed for, and with them, or some, or one of them, such other relief as the nature of the case may require, and may be agreeable to equity and good conscience."

The Farmers' Loan and Trust Company v. Carroll.

The defendants put in their answers, to which replications were filed, and proofs were taken in the cause.

The cause was argued by

H. Denio & Wm. Curtis Noyes, for the plaintiffs.

A. Worden & J. C. Spencer, for the defendant *C. H. Carroll*, and

C. P. Kirkland, for the other defendants.

Points and authorities submitted on the part of the plaintiffs.

I. The Farmers' Loan and Trust Company were authorized by their charter, and the acts amending the same, to receive and execute a trust of real estate, and in particular to receive and execute the trusts mentioned in the bill in this cause. (*Angell & Ames on Corporations*, 2d ed. pp. 100, 105. 2 *Kent's Comm.* 3d ed. 279. 12 *Mass. Rep.* 556. 3 *Pick. Rep.* 237. 1 *Paige*, 214. *Hill on Trustees*, 48. 2 *Howard's U. S. Rep.* 127. *Laws of 1822*, p. 47, §§ 1, 19. *Id.* p. 254, § 2. *Laws of 1836*, p. 281, §§ 2, 3, 6.) II. The purposes for which the trusts in this case were created, are expressly authorized by the revised statutes, being to sell the lands for the benefit of creditors, and for the purpose of satisfying charges thereon. (1 *R. S.* 728, § 55, sub. 1 and 2.) The creditors in this case were creditors by mortgage, which mortgages were specific liens upon the real estate, and also upon debts due from the estate of Charles Carroll, deceased, which, by the express language of his will, were made a charge upon his real estate, and they were also made specific charges by the language of the revised statutes. (2 *R. S.* 452, §§ 32 and 51. 1 *Barb. S. C. Rep.* 271.) III. The deeds and declarations of trust, taken together, show a manifest intention to create lawful trusts for a legal purpose, making the usual provisions for compensation to the trustee for trouble and responsibility; and none of these provisions give the transactions any other character than that of trusts. (1 *R. S.* 740, § 2. *Hobart's Rep.*

The Farmers' Loan and Trust Company v. Carroll.

277. 1 *Ventris*, 141. 2 *Brod. & Bing.* 49. 22 *Wend.* 483. *Coke Litt.* 272 B. *Saunders on Uses and Trusts*, 7, *Just. Inst. lib.* 2, tit. 23, § 1. *Willis on Trustees*, 1. 4 *Kent's Comm.* 4th ed. 288. 3 *Hill*, 95. *Lewin on Trusts*, 498, 512. 1 *R. S.* 725, § 35. *Id.* 730, § 63. 2 *Wheaton*, 45. 4 *Nev. & Man.* 668. 3 *Ad. & Ellis*, 99.) IV. If the deeds and declarations of trust taken together, do not create valid trusts *per se*, yet they do create *powers in trust*, and these powers may be lawfully executed by the company; at all events, with the aid of a court of equity, for the purposes specified in the declarations of trust. (1 *R. S.* 732, §§ 74, 75, 77, 78, 94. *Id.* 735, §§ 107, 108, 109. *Id.* 734, §§ 96, 103. *Id.* 730, § 63. 14 *Wend.* 323. 22 *Id.* 483. 1 *R. S.* 729, § 58. 6 *Watts & Serg. Rep.* 190. 2 *Cowen*, 246. 7 *Paige*, 509. 2 *Barb. Ch. Rep.* 271, and cases there cited.) V. If the instruments executed between the parties should be held invalid as trusts, and as powers in trust, they are still sustainable as covenants on the part of the defendant Charles H. Carroll, to convey the lands when the company should dispose of them or have a right to dispose of them, in order to satisfy the charges for which the agreements were entered into, and which, in fact, yet remain unpaid. These covenants, as such, may be specifically enforced, so as to promote the equity and justice of the case, and the intent of the parties. VI. The instruments executed by the parties do not amount to, nor are they mortgages, but simply what they purport to be, conveyances and declarations of trust. (*Powell on Mort.* new ed. 10, note, and 12, note. 8 *Lond. Jurist*, 366. 3 *Hill*, 95. *Sugden on Vendors and Purchasers*, App. 4, 11. 18 *Vesey*, 344.) VII. As to the individual property of the defendant Charles H. Carroll, there can be no doubt he was authorized to create the trust; and as to the real estate of Charles Carroll, deceased, of whom he was executor, he had, under the will, ample power and authority to execute the deed and declaration of trust, and thereby provide for the payment of the debts of the testator, which by his will, as well as by the statute, were charges upon it. (1 *Jarman on Wills*, 172, 181. 2 *Id.* 396, note. *Id.* 512, 520.

The Farmers' Loan and Trust Company v. Carroll.

1 *Ad. & Ell.* 229. 11 *John.* 365. 13 *Id.* 537. *Williams on Ex'rs.* 413, 531, 532. *Fletcher on Estates*, 66. *Id.* 4, 76. 4 *Kent's Com.* 320. 3 *R. S. App.* 385. 1 *Powell on Devises*, 243, 3d ed. 1 *Powell by Jarman*, 245 and note. 7 *Cowen*, 193. 2 *Wend.* 1. 12 *Id.* 602, 663. 1 *Vesey, jr.* 134. 5 *Paige*, 323. *Lewin on Trusts*, 264, 265. 1 *Powell on Devises*, 234, note 9. 1 *Sugden on Powers*, 538. 2 *Id.* 298. 3 *Sandf. Ch. Rep.* 117.) VIII. There was no usury in the transactions. (*Lewin on Trusts*, 444. 9 *Paige*, 398. 2 *Metc. Rep.* 420. 4 *Hill*, 22. 13 *John.* 40. 4 *Denio*, 264. 9 *Peters' Rep.* 376. 19 *John.* 496. 3 *Edw. Ch. Rep.* 143. *Id.* 424. 1 *Bos. & Pull.* 144. 25 *Wend.* 643. 10 *Id.* 116. 2 *John. Ch.* 182. 8 *Conn. Rep.* 513. 14 *Id.* 594. 1 *Hill*, 227. 3 *Wend.* 62. 2 *Denio*, 621. 4 *Bing.* 81. 1 *Clarke's Rep.* 32. *Id.* 432. 4 *Hill*, 472, 481.) IX. The certificates were not a violation of the restraining acts; nor, if they were, would that invalidate the trust agreements. (15 *Wend.* 256. 7 *Ad. & Ell. new series*, 232. 53 *Eng. Com. Law Rep.* 231. 6 *Watts & Serg.* 227. 10 *Paige*, 110. 6 *Scott's Rep.* 267. 2 *R. L. of* 1813, 234. *Laws of* 1818, 242. 14 *John.* 205. 1 *R. S.* 712, §§ 3, 5, 6. 5 *Hill*, 590. *S. C.* 6 *Hill*, 217. 4 *Wend.* 298. 7 *Id.* 276. 8 *Cowen's Rep.* 709. 1 *R. S.* 600. 2 *Hall's Rep.* 515. 22 *Wend.* 483. 13 *Conn. Rep.* 249. 22 *Pick.* 181. 3 *Metc. Rep.* 581.) X. But the defendant Charles H. Carroll is not at liberty to set up the want of authority on the part of the company, to enter into the transactions, nor the alleged illegality growing out of the objection that the certificates were violations of the restraining acts. (7 *Wend.* 539. 8 *Id.* 480. 5 *Hill*, 137. 6 *Id.* 53. *Cowen & Hill's Notes to Ph. Ev.* note 192, and cases there collected. 2 *Smith's Lead. Cases*, 437, note. 21 *Wend.* 94. *Id.* 172. 1 *Barn. & Ad.* 142. 1 *Story's Eq. Jur.* §§ 191, 2, 3, 5, 7 and 203. 10 *Paige*, 326. 2 *Bro. Ch. Cases*, 380, 385. 3 *Cowen*, 537. 1 *Story's Eq. Jur.* § 375, b. 4 *Cowen*, 266.) XI. The certificate holders, being fully represented by the plaintiffs, are authorized, in equity, to ask the enforcement and to receive the benefits of the deeds and declarations of trust; they being the parties

The Farmers' Loan and Trust Company v. Carroll.

chiefly interested in the property, and whose money has been received by the defendants, in consideration of the trusts created mainly for their use. (9 *Paige*, 432. 10 *Id.* 465, 595. 4 *Kent's Com.* 3d ed. 307. 3 *John. Ch.* 261. 4 *Id.* 136. 6 *Ves.* 447. 1 *Dan. Ch. Pr.* 348, 349, 350, and notes to *Perkins' ed.* 4 *Paige*, 510. 1 *Story's Eq. Pl.* § 544 and notes. 2 *Y. & Coll.* 257.) XII. The charter of the Farmers' Loan and Trust Company has not expired, but it still exists as to trusts, and all its original powers except fire insurance. (*Laws of 1822*, pp. 47, 254. *Laws of 1836*, p. 281. 3 *Sandford's Ch. Rep.* 33. *Lewin on Trusts*, 83, 85.) XIII. The plaintiffs are therefore entitled to a decree for the specific execution of the trust agreements; the jurisdiction of the court, as a court of equity, being properly invoked for the purpose of enabling them to overcome the difficulties which the defendants have thrown around the performance of the trusts by the company. (4 *Paige*, 399. 2 *Id.* 509.)

Points and authorities submitted on the part of the defendant Charles H. Carroll.—The whole transaction between the company and Carroll, was in violation of law, and void. All these papers constitute one transaction, and it is a loan by the company, secured by mortgage; or it is a trust, or a power in trust. I. These instruments do not create any trust or power in trust; and if there was a trust, it was not such an one as the company was authorized to take and execute. (1 *Russ. & Myl.* 605. 18 *Wend.* 319, and cases cited. 5 *Hill*, 225.) II. It was a loan secured by mortgage. (7 *John. Ch. Rep.* 42. 2 *Ball & Beat.* 277. 5 *Hill*, 228.) III. After the 28th February, 1837, fifteen years from the date of the act of incorporation, the company ceased to be a corporation, for any other purpose than to consummate engagements previously made; and at all events, the power to make trusts then expired. (2 *Paige*, 116. 2 *Cowen*, 420. 4 *Hill*, 76, 96. 2 *Kent's Com.* 298. 1 *R. S.* 600. 3 *Id.* 732, § 3. 3 *Barn. & Ald.* 10. 15 *John.* 383, 389, 390. 2 *Cranch*, 10.) IV. The loan made by the company was illegal and void. (1.) It was in violation of

The Farmers' Loan and Trust Company v. Carroll.

their charter, in stipulating for a premium or commission on the transaction, contrary to section 4 of chap. 211, of laws of 1836. (2.) The certificates were illegal, in being made transferable on their face. (7 *Wend.* 34. 2 *Cowen*, 666, 678.) V. It was in violation of the restraining acts. (3 *Wend.* 300. 9 *Paige*, 476. 9 *Wend.* 392. 2 *Cranch*, 127. 12 *Wheat.* 68. 13 *Peters*, 587. 14 *Id.* 122. 3 *Barn. & Ald.* 10. 3 *Wend.* 583. 7 *Id.* 276. 5 *Paige*, 653, 654. 20 *Wend.* 392. 2 *Myl. & Craig*, 83. 14 *Eng. Ch. Rep.* 87. 4 *Peters*, 188, 189. 1 *Hopk. Rep.* 26. 15 *John.* 389, 390.) VI. The transaction was usurious; whether it be called a loan on mortgage, or a trust, or power in trust, and cannot be enforced for any purpose, or to any extent. (1.) In the difference of two per cent of interest between the certificates loaned and the securities received. (2.) In the loan of securities that were worth much less than their nominal value. (1 *Durn. & East*, 208. *Pow. on Mort.* 297. 7 *Paige*, 582. 2 *Peters*, 537. 4 *Porter*, 128. 1 *Beatty*, 282. 2 *Moll.* 134. 2 *Paige*, 268. 4 *Hill*, 222, 234. 2 *Halsed's N. J. Rep.* 130. 1 *Russ. & Myl.* 50. 8 *Simons*, 404. 4 *Peters*, 205. 9 *Id.* 419. 13 *John.* 40. 16 *Id.* 574. 3 *Sandf. Ch.* 215, 260, 261. 1 *Peters*, 87. 4 *Hill*, 255. 1 *Paige*, 546. 7 *Id.* 637, 559. 1 *John. Ch.* 536. 15 *John.* 389, 390. 7 *Hill*, 462, 463. 3 *Bos. & Pull.* 154. *Comyn on Usury*, 122.) VII. The holders of the certificates have no rights or remedies, legal or equitable, against this defendant. (1 *Russ. & Myl.* 605. 4 *Hill*, 442. 3 *Barn. & Ald.* 10. *Story's Conflict of Laws*, §§ 242, 243, 244, 3d ed.)

C. P. Kirkland, in behalf of the defendants represented by him, submitted several points, with numerous authorities; but as they are substantially embraced in those presented by the counsel for the defendant Charles H. Carroll, they are here omitted.

By the Court, WELLES, J. This cause has been argued with all the learning and ability demanded by the amount in controversy, and the importance of the principles involved

The Farmers' Loan and Trust Company v. Carroll.

Many topics have been discussed in the arguments, as illustrative of the principal grounds of controversy, upon which, however, in the view I have taken of the merits of the cause, it is not necessary to express an opinion. I shall, therefore, confine myself to the exposition of those questions and principles, which, in my judgment, dispose of the whole litigation, as far as they appear proper for the final adjudication of the present suit.

The question whether the trust powers conferred upon the Farmers' Loan and Trust Company by the act of April 17th, 1822, (*Sess. Laws of 1822, ch. 240*,) survive the fifteen years' limitation of the act by which that company was chartered, (*Sess. Laws of 1822, ch. 50*,) was elaborately discussed upon the argument, and has received a careful examination; but upon submitting my views upon that subject to my brethren, there does not appear to be a unanimity of opinion; and as the cause may be decided without reference to that question, the consideration of it here, is waived.

I. Assuming that such trust powers do continue, were the transactions in this case within the scope and purview of those or any other powers of the company, and what was the real and true nature of the transactions?

The parties, when they entered into them, were careful to denominate them trusts. If they have called them by right names they certainly are most unusual trusts, and it was well remarked on the argument, by the plaintiff's counsel, that the instruments creating them were anomalous in their form, although he contended that was no objection to them; that they resembled trusts more than mortgages, and that effect should be given to them accordingly as they most assimilated to the one or the other.

The doctrine of uses and trusts was early introduced into the jurisprudence of England, probably as early as in the reign of Edward 3. It was adopted by the ecclesiastics of that age to evade the statutes of *Mortmain*, and was borrowed from the *fidei commissum* of the civil law. (1 *Cruise's Dig.* 354 to 359. *Story's Eq. Jur.* §§ 965, 6.) The intention of the statute (27 *Hen.*

The Farmers' Loan and Trust Company v. Carroll.

8 *ch.* 10,) was to destroy that double property in land which had been introduced by the invention of uses. But that intention was, to a great extent, defeated by the strict construction given to the statute by the subtlety of the early English chancellors, by holding that there were some uses to which the statute did not transfer the possession, but which still continued separate and distinct from the legal estate, and were taken notice of and supported by the court of chancery, under the name of *trusts*. (1 *Cruise's Dig.* 411.) A trust therefore is now said to be a use not executed by the statute. (*Id.*) The same author describes a trust estate "to be a right in equity to take the rents and profits of lands, whereof the legal estate is vested in some other person; to compel the person thus seised of the legal estate, who is called the trustee, to execute such conveyances of the land as the person entitled to the profits, who is called the *cestui que trust*, shall direct, and to defend the title to the land. In the mean time, the *cestui que trust*, when in possession, is considered, in a court of law, as tenant at will to the trustee." Another author has the following: "A trust cannot be more exactly defined than in the terms employed by Lord Coke for the definition of a use, to wit: *A confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which cestui que use has no remedy but by subpoena in chancery.*" (*Lewin on Trusts*, 15.) The author then analyzes the definition by a division of it into six parts, and giving to each a particular consideration and explanation. Upon the 2d he remarks, "It is a confidence *reposed in some other*; not in some other than the author of the trust, for a person may convert himself into a trustee, but in some other than the *cestui que trust*, for as a man cannot sue a *subpoena* against himself, he cannot be said to hold in trust for himself. If the legal and equitable interests happen to meet in the same person, the equitable is forever absorbed in the legal; as if A. die seised of the legal estate *ex parte paterna*, and of the equitable *ex parte materna*, the maternal line has no equity against the heir of the paternal." (*See also Goodright v.*

The Farmers' Loan and Trust Company v. Carroll.

Wells, Doug. 777.) Three things are said to be indispensable to constitute a valid trust; first, sufficient words to raise it; secondly, a definite subject; and thirdly, a certain or ascertained object. (*Story's Eq. § 964. Crunys v. Coleman, 9 Ves. 323.*)

By the revised statutes of this state, all passive trusts are abolished, and the whole beneficial interest or equitable right to the possession and the reception of the rents and profits of the land, is vested in the *cestui que trust*. Express or active trusts are allowed for the following purposes: 1st, To sell land for the benefit of creditors; 2d. To sell, mortgage or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon; 3d. To receive the rents and profits of lands, and apply them to the education and support of any person during life, or any shorter period; subject to certain limitations and restrictions contained in §§ 37, 38, 39, (1 *R. S. 727*.) of the previous article; 4th. To receive the rents and profits of real estate, and to accumulate the same for the same purposes and within the same limitations and restrictions. (1 *R. S. p. 727, § 45; p. 728, § 55.*) By section 2 of the act of April, 1822, before referred to, the trust powers of this company are restricted to such trusts, "as are usual with other trustees," and they are only authorized to receive and execute such trust, as are declared in the deed or devise by which the property is conveyed to them in trust.

In the first article of the agreement between the company and Carroll, the former covenant that they will, in consideration of the conveyances which are declared to be in trust, "and with a view to enable the said Charles H. Carroll, to pay off and satisfy all the charges, liens and incumbrances upon the said real estate," immediately execute and deliver to Carroll the certificates, &c. In the second article, it is declared to be understood that Carroll shall apply the certificates, or their proceeds, to the payment of the liens and incumbrances. So far, I can perceive nothing that savors of a trust. It is nothing more than an agreement, by the company, to loan the certificates, and by Carroll, to make a certain application of them, or a portion of them. The company have no active duty to perform. Carroll

The Farmers' Loan and Trust Company v. Carroll.

is to pay the incumbrances by means of the certificates thus obtained. The next article authorizes the company to make sales and conveyances of the land to purchasers, "whenever duly authorized and requested" by Carroll. It give the company no authority to sell, excepting as so authorized and requested. They are not to give covenants to purchasers, but Carroll is bound to do so when required. The company are to receive the consideration money, and to decide whether it is sufficient in amount in reference to the land to be conveyed. They are, in fact, to do nothing but execute conveyances when Carroll shall direct. They may, and I see not but they must, remain entirely passive, except as Carroll permits them to act. No discretion is reserved to them, except what shall be necessary to prevent their security being impaired; a provision which would be quite necessary and proper, viewing the transaction in the light of a loan secured by these conveyances. The fourth article seems to be similar in its object and effect to the last. No duty whatever is imposed upon the company. Carroll's active duties are enlarged and specified, with a provision that they shall be so exercised as not to impair or diminish the security of the company, and saving their right to receive all moneys, &c. The fifth article makes it the duty of the company to collect moneys, &c. "upon the request of the said Charles H. Carroll, and to make sale or sales of the whole or any part of the real estate conveyed, at any time after ten years from the date of the agreement, "and at any time sooner, *should it become necessary for the safety and indemnity*" of the company. Here, then, are provisions for the benefit and security of the company only. They are to collect and receive moneys upon request of Carroll, and they may collect without his consent, and also may sell the whole or any part of the trust estate, after the lapse of ten years, and sooner, *if necessary for their safety or indemnity*. All this looks, to my mind, much more like providing for the repayment of a loan than the provisions of an active trust, or the specification of the duty of a trustee. It will be seen that this article leaves the company no discretion or power to act, until set in motion

The Farmers' Loan and Trust Company v. Carroll.

by Carroll, except in case it becomes necessary for their safety and indemnity; when in effect, a proceeding in the nature of a foreclosure, not for the benefit of any *cestui que trust*, but for their own benefit exclusively, is authorized. And with respect to the duty of collections mentioned in the first part of the article, it is not to be undertaken unless requested by Carroll; and provision is made in other places for the appointment of an agent to make the collections and for the performance of other duties, all at the expense of Carroll. The sixth article provides for the appointment, by the company, of an agent, to be approved of by Carroll, resident in Livingston county, with full powers to collect and receive, on behalf of the company, all moneys, &c. to deliver deeds, &c. upon receiving the purchase money, &c. all to be paid over by the agent to the company, &c. This is no more than another of the means, in detail, adopted by the parties, with a view to the reimbursement of the company for the amount of the certificates. No mention or allusion is made to any *cestui que trust*. The seventh article requires all bonds and other securities, and papers to be to and with the company, "who are to receive all moneys," &c.; pointing, as in the last, solely to the reimbursement of the company. The eighth declares that the compensation of the agent, to be appointed under the sixth article, shall be fixed by the company, which, with all other expenses of the trust, is to be borne by Carroll. This provision, it seems to me, only has the effect to protect the company against any diminution of their expected profits to arise out of the transaction, and does not, in the remotest sense, fortify the idea of a trust. The ninth does nothing more than the law would probably have done without it, viz. requiring the company to recognize and fulfil outstanding leases—a provision as proper in view of a loan secured by these conveyances, as of a trust. The tenth article declares that Carroll shall pay and allow seven per cent. per annum to the company, on the amount of the certificates, to commence at the time of their delivery, which, by the first article, were to bear interest at five per cent per annum, the difference between the interest which the company were to pay, and that which

The Farmers' Loan and Trust Company v. Carroll.

they were to receive, being two per cent, is declared to be "only a compensation, allowance or commission" to the company, for undertaking and executing the trust, &c.; and the same article provides for selling, &c. in case interest remains due the company over thirty days. While the parties here talk about a trust, not one of the characteristics of a trust appears. The eleventh contains a provision for the redemption of the certificates, and a pledge of the capital of the company to that object. The twelfth, is an agreement by the company to receive good bonds and mortgages, well secured, &c. upon portions of the premises conveyed, worth double the amount "*to be loaned* on the same;" such bonds to be payable within ten years from the date of the agreement. The last two articles certainly have nothing in them to characterize the transaction as a trust. The 11th is designed to give credit to the certificates, and render the holders secure, and the 12th looks to the repayment of their amount to the company, and provides how it may be made. The thirteenth, and last of the articles of agreement, is any thing but a declaration of trust. It is merely a covenant on the part of the company to reconvey, upon payment being made in any of the ways before provided, and a covenant on the part of Carroll to pay any deficiency that may be found due the company, should the real estate, and securities to be taken on sales thereof, prove insufficient to reimburse them the amount of the certificates to be delivered to Carroll, and to indemnify the company against all loss or damage, &c.

I have thus gone through with an examination of all the provisions and articles of one of the agreements by which it is contended that a trust is manifested, with the view of discovering, if there were to be found the usual attributes and properties of a trust. Supposing Carroll to be the creator of the trust, and this company the trustee, who is the *cestui que trust*? I confess that I have been unable to find any. If it is said that they are the persons holding the incumbrances mentioned in the recitals to the agreement, the answer is that the trustee has no duty to perform to them, of any description whatever. The company are not bound to pay them, and no privity exists between

The Farmers' Loan and Trust Company v. Carroll.

them. Suppose the incumbrances should never be discharged by the company or Carroll, could a bill be sustained by the creditors against the company, to compel the satisfaction of the incumbrances, or to enforce the execution of the trust in their favor? I think not; for the reason that the company have not agreed to pay these incumbrances. It would be most unjust and inequitable to compel them to do so, because they have furnished Carroll with the means to do it; and it would, in effect, be requiring them to pay twice for the same thing, and that to persons with whom and themselves there appears to be no relation or privity. I think, also, there may be some objection, on the ground that there is no certain or ascertained object; by which I mean that the papers and instruments by which it is contended the trust is manifested, do not indicate, with sufficient clearness, who are the beneficiaries of the trust.

The agreement recites 1st. That Carroll is the owner of certain real estate, situate, &c.; 2d. That there are several charges, incumbrances or liens outstanding and existing upon it; 3d. That Carroll, being desirous of having the real estate converted into cash and available securities, by the sale of the same in suitable parcels and at convenient times, the company had agreed to accept a conveyance of the real estate, and assume, perform and execute for Carroll, the trust thereby declared, &c. and that Carroll had, in pursuance of the agreement, executed and delivered to the company, on the same day, a conveyance in fee of the said real estate. The agreement then witnessed that the conveyance was made by Carroll and accepted by the company, upon the special trusts and agreements thereafter declared, &c. Then follows the thirteen articles before mentioned.

In looking through this whole agreement, and regarding it in the light of a trust, I am at a loss to see the object. What was the company to do but, in substance, to advance their credit to Carroll, and receive back the amount advanced, with interest? Every provision of the agreement may be referred to and brought within these two objects. They could not even sell any of the land without the concurrence of Carroll, unless in

The Farmers' Loan and Trust Company v. Carroll.

default of the payment of interest or principal ; and in either event, it was a means of reimbursement of their advance to Carroll, and for no other object.

Again ; Carroll was at liberty to put an end to their powers any day, by refunding, &c. upon which they were bound to re-convey the land to him. All these things are substantially the usual incidents of a loan secured by mortgage.

In the consideration of the question, it is proper to inquire not only whether the transaction can be upheld as a trust in any sense, but whether it is *such a trust* as the company by their chartered powers were authorized to undertake ; and also whether it is such a one as is authorized by the revised statutes.

By reference to the 2d section of the act of April, 1822, before referred to, it will be perceived that the trusts which the company are authorized to take, are such, and such only, as are declared in the deed or devise, by which the property to be held in trust is conveyed to them. It was said, on the argument, in answer to the objection that the alleged trust was not declared in the deed by which the land was conveyed, that the deed, declaration of trust, and the certificates were all one transaction, and should be considered the same as if they were all embodied in one and the same instrument. They may, perhaps, be regarded as one transaction ; but does it follow that they should therefore be treated as one instrument ? In view of the objection under the statute, I think it does not. All the evils which the statute was designed to guard against, are liable to exist as much in this case as in any other. It is not, in this view, a question of construction of the instruments, or whether each is to be interpreted with reference to the others, *but a question of power*. Where a corporation relies upon a grant of power from the legislature, for authority to do an act, it is as much restricted to the mode prescribed by the statute for its exercise, as to the thing allowed to be done. In this case the legislature say to the company, you may take conveyances in trust, and execute such trusts as are declared in the conveyances. It does not say you may take and execute trusts generally. I incline strongly to think the trust power of the

The Farmers' Loan and Trust Company v. Carroll.

company was limited by the statute to such trusts as should be declared in the deed or devise, and as no trust is declared in the conveyance in this case, that the power has not been well executed.

If this transaction is a trust, is it such a one as is usual with other trustees. It was contended upon the argument on behalf of the plaintiffs, that the statute in this respect only intended to confine the company to legal trusts. If that be so, I can see no utility in the provision; for it could not have been necessary, in order to prevent illegal trusts, to insert an express provision prohibiting them. It may be difficult to give an instance of a trust otherwise legal, which this company might not take, unless the present case affords an illustration; provided it be a trust in any sense. I have supposed that where a usual valid trust is created, all parties but the trustee retire from any active participation in it, and that the beneficiaries designated could always go to a court of equity for the enforcement of their rights against the trustee. Here the trustee had nothing to do after the papers were executed, but to take care of itself; and no remedy, legal or equitable, is left to the *cestui que trust*, as I have before attempted to show, against the trustee.

The late Vice Chancellor Whittlesey, in an opinion upon denying a motion to dissolve the injunction mentioned in this cause, says, upon the point now under discussion, "The legitimate office of a trustee is to manage the estate or fund committed to him, with care and fidelity, invest its avails for the benefit of the persons interested, or, in other words, to receive and manage the property of others for the benefit of other parties. It is no part of the legitimate office of a trustee to give his own obligations, predicated upon the trust estate, or to assume any other liability than care and fidelity. Least of all is it legitimately or properly his office to give his own obligations simultaneously with the creation of the trust, and assume a trust created for the very purpose, and no other, of meeting the obligations executed by himself. The latter would be a mere security or indemnity for his own liabilities, and possesses, so far as I can perceive, no one feature of a trust." It seems to

The Farmers' Loan and Trust Company v. Carroll.

me that there is much force and reason in these remarks, and they accord so well with my own views that I have thought proper to introduce them in this connection.

Again; was this transaction a trust authorized by the revised statutes? It was not claimed, upon the argument, to come within either of the subdivisions of the section authorizing express trusts, (1 R. S. 728, § 55,) excepting the first and second. Those are, 1st, to sell lands for the benefit of creditors; 2d, to sell, mortgage, or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon. It was insisted that the case did come within both of these subdivisions.

First, to sell lands for the benefit of creditors. Is this trust, as manifested by the agreement, created for that purpose? The argument is that it is for the benefit of the incumbrancers who are creditors, by putting in the hands of Carroll the means of paying and discharging them. But the question returns, how are they to be benefited? Where is the security that Carroll would be able to convert the certificates into money, or that the creditors would receive them in payment; or that Carroll would not misapply these means or convert them to purposes of speculation? The creditors have no power over the company, in any event, nor over Carroll beyond what they possessed before the transaction was entered into. It is not perceived how the creditors could be benefited in any legal sense by the creation of such a trust.

Second. To sell, mortgage, or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon. The inquiries and remarks made in reference to the first subdivision apply with the same force to this. The argument to bring the case within either of these provisions seems to me to be far fetched, and that after an examination of the agreement, it is impossible not to see that the object was one entirely different from any thing contemplated by the section of the statute in question, as I shall hereafter attempt to show.

II. It is claimed on the part of the plaintiffs, that if these instruments do not create valid trusts *per se*, they do create powers in trust, which may be lawfully executed by the com-

The Farmers' Loan and Trust Company v. Carrell.

pany, with the aid of the court of chancery, for the purposes specified in the agreement. Many of the arguments to show that here was not a trust, go equally to prove that there was no power in trust. The revised statutes have attempted to restrict and simplify the doctrine of powers, and powers in trust; whether the attempt has been successful, is doubted by many. The doctrine was among the most intricate and difficult in the law, on account of its artificial character, and the refinements and subtleties of logic to which it was frequently carried. The statute, however, still recognizes the doctrine, under the modifications which it has undertaken to create.

A power in trust is to be understood in contradistinction to an estate in trust. The former is a mere authority or right to limit a use, while the latter is an estate or interest in the subject. A trustee is always invested with the legal estate; but this is not necessary with respect to the donee of the power. In the case of a power in trust, there is always a person other than the donee or grantee of the power, which person is called the appointee, answering to the *cestui que trust* in a simple trust. The revised statutes define powers in trust as follows: "A general power is in trust when any person or class of persons, other than the grantee of such power, is designated as entitled to the proceeds or any portion of the proceeds or other benefits to result from the alienation of the lands according to the power. A special power is in trust, first; when the disposition which it authorizes is limited to be made to any person or class of persons, other than the grantee of such power. Second; when any person or class of persons, other than the grantee, is designated as entitled to any benefit from the disposition or charge authorized by the power." (1 R. S. 734, §§ 94, 95.) These provisions show that in all cases of a power in trust, an appointee or beneficiary other than the grantee of the power, is contemplated. It is as necessary an ingredient in the case of a power in trust, as a *cestui que trust* is in the case of a conveyance or devise in trust. In the present case, the question naturally arises, who or where is the appointee or person or class of persons beneficially interested in the execution of the

The Farmers' Loan and Trust Company v. Carroll.

power, other than the grantee of the power? No third person has any interest whatever in the performance of the stipulations and provisions of the agreements. A power in trust involves the idea of a trust, as much as a trust estate. In both cases a confidence is implied. The difference is in the mode of effectuating the object. In one case it is done through a conveyance or devise of an estate in trust, by which the grantee or devisee becomes seised of the legal estate in the land; in the other, by the creation or grant of a power by which the donee is invested with an authority in relation to the future use or disposition of the land.

Having shown, under a former head, that here was no trust, in the proper sense of the term, and believing that there can be no power in trust, independent of the idea of a trust; in other words, that there can be no power in trust without an appointee or beneficiary other than the donee of the power, I deem it unnecessary to spend more time to prove that here can be no power in trust; excepting to add that it appears to me that there is no power given in this case to the company, of a different nature from that which is in substance contained in many mere mortgages. Here is a power to sell the land in case of default of payment, and that is all the company are authorized to do, without the approbation of Carroll; and all they are empowered to do with his consent has for its object the same thing in substance—the repayment to them of the amount advanced. In both cases it is solely for their benefit, and the interest of any supposable appointee or beneficiary entirely lost sight of and disregarded.

III. The plaintiffs also contend that if the instruments between the parties should be held invalid as trusts and as powers in trust, they are still sustainable as covenants, on the part of the defendant Charles H. Carroll, to convey the lands when the company should dispose of them, or have a right to dispose of them, in order to satisfy the charge for which the agreements were entered into, and which yet remain unpaid.

The examination and discussion which I have given this case so far, has been more to meet the affirmative propositions

The Farmers' Loan and Trust Company v. Carroll.

advanced by the plaintiffs' counsel, and to show what the nature and legal effect of the transaction was not, than what it was; and perhaps unnecessary time and labor has been devoted to that object; for if the view I entertain as to what its true character was, in substance and effect, be correct, it refutes and overturns each of those propositions. The one last stated will be met by endeavoring to show what, upon my first acquaintance with the case upon the argument, was strongly impressed upon my mind, and which has been fully confirmed by subsequent examination and reflection; and that is, not only that the legal effect of the execution and delivery of these instruments was to constitute a loan by the Farmers' Loan and Trust Company to Charles H. Carroll, and to secure the repayment thereof by the latter to the former—but that such was the understanding and intention of the parties at the time; although it was to be disguised by terms and language employed in the papers, as a trust.

It seems to me that no person can attentively examine all these papers together—the conveyances, the agreements, and the certificates with the *coupons* annexed—without being forcibly impressed with the idea of a loan. Notwithstanding the name by which the parties have chosen to call it, the essence of it all is to place Carroll in funds, no matter for what object, which funds the company are forthwith to furnish in the shape of these certificates; and to secure a return of the amount by Carroll, he conveys the lands and real estate to them. It was money, or something that he could convert into or use as money, that Carroll wanted. It was something with which he should be able, among other things, to pay debts. The first and second articles of the agreements show this to have been the case. The second seems to contemplate, in the first place, that he shall use the certificates as money, if practicable; and secondly, if not practicable, to dispose of them for money; and the certificates were as really obligations on the part of the company to pay money, as the notes of a bank could be. They were to be, and were in fact, something to answer the place of money. For that purpose Carroll wanted them, and for no

The Farmers' Loan and Trust Company v. Carroll.

other ; and that such was the mutual understanding of the parties is further evident from the fact that after the execution of the papers, and before the company would allow them to be unconditionally delivered to Carroll, they were put into the hands of an agent of the company, who was dispatched with Carroll to Baltimore with a view to the latter using them in the liquidation of the incumbrances held by Tiernan and Mrs. Brinton. After Carroll had subsequently placed the certificates in the hands of the agent of the Rothschilds to be remitted to Europe and sold, and had received an advance from the latter on account of them, he deposited with the company the whole amount of funds so obtained, and stipulated with the company to allow them to retain, in deposit, \$26,000, for the payment of what might be due on the Tiernan mortgage ; the balance, together with such further sums as should be deposited with the company on his account by Rothschilds' agent, were to be held by the company subject to Carroll's drafts upon them. It seems to me that in any and every aspect in which the matter can be viewed, it is seen to be nothing but a financial operation for the sole purpose of obtaining money by Carroll upon the security of the real estate in question.

The various proceedings between the parties, and the communications passing between them, previous to the consummation of the transaction by the execution and delivery of these instruments, go quite as far to prove it to be a loan as a trust, and I think much farther ; for although the parties have sometimes remembered to call it a trust, yet the idea of an advance by the company to Carroll is a prominent and leading idea throughout. Strike out that, and it is impossible to perceive a rational motive on the part of Carroll to induce him to engage in the transaction. In some of the preliminary papers, the word "*loan*" is used, and in others "*trust*." I do not attach much importance to these circumstances. The thing is to be judged of as a whole after its completion ; and if the parties have employed a false nomenclature in reference to the subject, that cannot determine its character or effect, but tends rather to cast suspicion upon it. Although the conveyances by Car-

The Farmers' Loan and Trust Company v. Carroll.

roll to the company are absolute in terms, and assume to convey the entire fee, yet the agreements executed by the parties, at the same time, show that they were intended only as security in the nature of mortgages for the repayment of the loan of the certificates; and they are therefore to be considered as mortgages. (1 R. S. 756, § 3.)

IV. Having come to the conclusion that here was neither a valid trust nor a power in trust, but that the transaction was a loan secured by instruments in the nature of mortgages, it becomes necessary to inquire whether it can be enforced as such. To this it seems to me there are two objections. 1. The company did not possess the power of making loans. Their act of incorporation gave them such power in express terms, but the act was to expire in fifteen years, except as to insurances on lives and the granting of annuities; and admitting that the trust powers conferred by the amendatory act of the same session in which the company was chartered, would survive the fifteen years, there is nothing in any of the acts to countenance the idea that the company's loan powers would survive that period. It may be that they might invest their surplus funds if necessary, and take security for the re-payment; if so, it would be only an incidental power to those of insurance upon lives, granting annuities, and receiving and executing trusts, and perhaps would be implied in order fairly to carry out those express powers which are retained under the acts. It cannot be contended that the company can carry on the business of loaning moneys by virtue of any power specifically granted by any statutory provision in force at the date of these papers; much less that they could loan their credit in the way and manner here attempted.

The 7th section of the original act of incorporation expressly prohibits the company giving any obligation for the payment of money, except to enable them to fulfil any actual engagement they may make or enter into for loans, &c. or to enable the corporation punctually to pay any losses they might sustain, &c. It seems to me to be idle to spend time to show that the giving of these certificates did not come within the excep-

The Farmers' Loan and Trust Company v. Carroll.

tion to this prohibition. The certificates were the thing loaned, and when delivered, the engagement for the loan was completed on the part of the company; and it is impossible to perceive how they can be regarded as enabling or as designed to enable the company to fulfil an engagement for a loan. 2. This loan, and all the securities relating to it, were illegal and void, as being in violation of the usury laws. The transaction was usurious upon its face, in making a difference of two per cent. between the interest to be paid by the company upon the certificates, and that to be paid by Carroll. In other words, that it was *per se* usurious. The nominal value of the certificates, at the time they were issued and delivered to Carroll, was not equal to the amount which Carroll was to pay for them, by just the difference in the interest between the two. To illustrate. Suppose A. agrees to lend B. \$1000, and it is a part of the agreement that B. shall receive the loan in negotiable promissory notes of third persons, due at a future day, bearing legal interest from the time of making the loan, and that B. shall repay the amount by the time the notes become due, with interest at the rate of nine per cent from the time of the loan. It seems to me that no one would deny that such a transaction would be usurious. If it would not, then why might not the borrower, in the case supposed, legally bind himself to repay the amount borrowed, with interest at the rate of 10, 15, 20, or any other rate per cent? And if 9 per cent would be illegal, 7 per cent would be equally so, if the notes borrowed bore an interest of only 5 per cent. The difference would be the same in both cases. And upon the same principle, if the notes constituting the loan were payable at a future day without interest, an agreement for repayment, with any rate of interest whatever, must be usurious. It results from the fact that the present *prima facie* value of the securities loaned are affected by the question whether they are upon interest or not, or by the rate at which they draw interest. If the \$1000 of notes are payable in one year without interest, they are worth \$1000 less the discount; that is to say, they would be worth at the time of the loan \$934.58; and the borrower would agree to pay

The Farmers' Loan and Trust Company v. Carroll.

therefore (on the supposition that the \$1000 was to be refunded with 7 per cent interest,) what was worth at the time, \$1000; or a bonus of \$65.42 beyond the legal rate of interest.

The trust certificates in the case at bar, were each worth, on the same principle, at the time they were issued, \$714.28 each, which is the par value, less the discount at two per cent, for twenty years; and by the operation of the instruments between the parties Carroll was in effect to pay to the company a bonus of \$285.72 on each \$1000 of the loan; making a total of \$27,143.40 in the two transactions, beyond the legal rate of interest.

I hold it to be law that in all cases of a loan where it appears upon the face of the transaction, that the lender is in any manner to receive more than the legal rate of interest as a compensation for forbearance upon the thing loaned, whatever the thing may be, it is usury *per se*. *Res ipsa loquitur*. The distinction is between a loan and a sale or guaranty. In the latter case a man may lawfully contract to receive a compensation beyond the legal rate of interest, provided it is not a cover for usury. Whether it be so or not is generally a question of fact, depending upon the intent of the parties. He has a right to put his credit or responsibility in market, and receive what he can fairly get for it, provided always it is not a device to cover up and hide from view a usurious intent. We have a long train of decisions, both in England and this country, recognizing and establishing that distinction, which are principally collected and referred to in the case of *Ketchum v. Barber et al.* (4 Hill, 224 to 255, and S. C. in error, 7 Id. 444 to 463.) Such, also, was the principle of the decision in the late case of *More v. Howland*, (4 Denio, 264.) It is also held or plainly implied in most of those authorities, that if the transaction assumes the character of a loan, it is within the usury statutes, provided more than the legal rate of interest is contracted for.

But I am prepared to hold the transaction usurious upon the evidence. These certificates, as before remarked, were treated by the parties as money. They were loaned to Carroll as such, and the repayment by him at their nominal amount, with interest

The Farmers' Loan and Trust Company v. Carroll.

at 7 per cent per annum was provided for. I think the weight of evidence is decidedly that at the time the loan was made, the certificates were not worth in market their par value. A number of witnesses were examined on this point, and most of them testify in substance that at the time this loan was effected they were at a discount of at least twelve and a half per cent, and not a witness, as I believe, shows them to have been of their par value at any time during the spring of 1838, when the negotiations were consummated. That the depreciation might have been owing in part or in whole to the pressure of the money market at the times to which the witnesses refer, does not in my judgment alter the case. Carroll bound himself to return their nominal amount in money, with lawful interest. It turned out that they were sold by Carroll, in order to raise money, at a ruinous sacrifice.

V. It is claimed by the plaintiff, that whatever may be the character or legal effect of these transactions, the mortgages to Tiernan and Mrs. Brinton legally and equitably belong to the Trust Company, they having been paid with funds furnished by the company, and the one to Tiernan having been assigned to the company by the consent of Carroll, and that the company are entitled, in equity, to be subrogated to them, and to have a decree in this suit for their foreclosure. To this claim I cannot assent, for several reasons. 1st. The agreements were absolute, that Carroll should receive the certificates; and he had the legal right to do with them as he pleased. The money he raised upon them was his to all intents and purposes, at least as against the company, who retained no lien upon the certificates or the proceeds of their sales, in law or equity, for any purpose whatever. If he violated his agreement to extinguish the incumbrances, it could only be the foundation of a personal claim upon him. 2d. These mortgages were in fact extinguished and paid off by Carroll, or with his money, and could not be kept on foot as debts secured by mortgages. If they were paid for by the company at all, it was as Carroll's agents, and by money raised by him by the sale of these certificates, and if they are valid in the hands of the holders,

The Farmers' Loan and Trust Company v. Carroll.

Carroll may be liable upon his endorsement of them as guarantor. 3d. They could not be held by the company to protect their title, for that title has been shown to be vicious for its illegality; and the mortgages being in their hands, can only be regarded ancillary to such title, and must fall with it. 4th. The doctrine of subrogation only applies to lawful and meritorious transactions. It is a doctrine which prevails only in equity; and it would be absurd to say if the transactions were illegal and void, and cannot be upheld for that reason, that these mortgages, which if paid for at all by the company, were based upon such illegal transactions, and taken by them by way of security for the loan, can be enforced by them.

VI. The only question that remains to be considered is whether the other plaintiffs who are the holders of a portion of these certificates, are entitled to any relief in this suit.

The argument in support of the affirmative of this proposition is founded entirely upon the assumption that the transaction which the preceding views condemn as usurious, illegal and void, was lawful, and can be enforced in some way. It is unnecessary to discuss the question on that assumption. If it was a loan upon usurious interest, and the certificates were under seal, as the plaintiffs contend, and, as I think, the proof establishes, the holders, as assignees, took them *cum onere*, chargeable with notice of all the material facts connected with their original concoction and subsequent mutations. If they did not possess the ingredients of commercial paper, that fact was sufficient to put all persons, dealing in them, upon inquiry, and deprives them of any protection as innocent or *bona fide* holders. I think they stand in no better situation, in this respect, than the company would after having redeemed the certificates.

I am therefore of the opinion that the holders of the certificates are not entitled to any decree in their favor. If I am right in holding the transaction a loan, and that it is affected with usury, then no one is entitled to any benefit from any thing connected with or growing out of it. In other words, the court will not aid a party who has been connected with it, or

Ingersoll v. Jones.

who stands chargeable with notice. *Potior est conditio possidentis.*

There were many points raised and discussed upon the argument which have not been adverted to in this opinion. The views expressed have superseded the necessity of doing so.

The result is that the bill must be dismissed with costs.

ALLEGANY GENERAL TERM, September, 1849. *Mullett, Sill, and Marvin, Justices.*

INGERSOLL vs. JONES.

The right to maintain an action on the case, for seduction, depends upon the relation of master and servant between the plaintiff and the person seduced; not on that of parent and child. And it seems courts will not look beyond the relations which actually exist, for the purpose of inquiring by what right they are sustained.

Where, in an action for seduction it appeared that the person seduced had a mother living, but her father she had not heard from in fourteen years and supposed him dead; that she had lived in the plaintiff's family most of the time since she was seven years old, and the plaintiff had taken her to bring up; that she was treated by him like one of his own children, and worked for him as they did, and was supported, clothed, and educated by him, and taken care of by him during her sickness, and he paid the expenses of her lying-in; Held, that for the purpose of prosecuting the suit, the plaintiff stood in loco parentis to her, and that he could maintain the action; although at the time of the seduction she was at service in another family, with the plaintiff's assent. Exemplary damages may always be allowed in actions on the case for seduction; whether the suit be brought by the parent of the person seduced, or by a person suing as master who is not also her parent.

In such an action, where it appears that at the time the seduction occurred, the person seduced was at service in another family, it is not improper for the judge to submit it to the jury to determine, whether the plaintiff was at that time entitled to the wages of the person seduced.

In an action for seduction the defendant cannot be allowed to prove, in mitigation of damages, that he has offered to marry the girl seduced.

MOTION by the defendant for a new trial, on a bill of exceptions. This was an action on the case, for the seduction of

Ingersoll v. Jones.

Mary Ann Campbell, the adopted daughter and servant of the plaintiff, and was tried at the Erie circuit in October, 1848. The bill of exceptions states, that Mary Ann Campbell was at the time of the trial about 22 years of age; that she had lived in the plaintiff's family ever since she was of the age of seven years, but during this time she had for some short periods at different times, with the approval of the plaintiff, been at service in other families. That the plaintiff *had taken her to bring up*, she was treated by him like one of his own children, worked for him as they did, and was supported, clothed, and educated by him. In the summer of 1845, she gave birth to a child, at the plaintiff's house. The defendant was the father of this child. Some year or more before the birth of the child, Mary Ann Campbell, in pursuance of an arrangement made between Mrs. Borland and the plaintiff's wife, went to service in the family of John Borland, where the connexion between the defendant and Mary Ann, which resulted in her pregnancy, took place. The girl had what she earned while she worked at Borland's, but some months before her lying-in, she returned to the plaintiff's, remained there and was taken care of during her sickness; her medical attendants having been employed and paid by the plaintiff. Mary Ann Campbell testified on the trial that she had not heard from her father since she first went to live with the plaintiff, and she supposed he was dead; but that she had a mother living. For the purpose of mitigating damages the defendant offered to prove, that in June of 1847, he offered to marry the girl, and that she was willing to marry him, but that the plaintiff refused to allow it. This evidence was objected to by the plaintiff's counsel, and excluded, and the defendant's counsel excepted. Other exceptions were taken on the trial, laying the foundation for the points made by the defendant's counsel on the argument, which are mentioned below.

E. Cook, for the defendant, made the following points.

1. The father of Mary Ann Campbell, if living, and if dead her mother, could maintain an action against the defendant for

Ingersoll v. Jones.

the seduction ; notwithstanding her residence in the plaintiff's family. The plaintiff in this suit could not therefore recover. (9 *John.* 387. 2 *Wend.* 459. 5 *Cowen*, 106.) 2. The master, when not also the parent, can recover no more than the actual pecuniary damages sustained by him. (24 *Wend.* 429. 4 *Denio*, 461.) It was erroneous to charge that exemplary damages might be awarded. 3. The justice erred in submitting to the jury, as a question of fact, whether the plaintiff was entitled to the wages of Mary while at work for Borland. This should have been decided by him as a question of law. 4. The evidence of the offer of marriage, in mitigation of damages, was improperly excluded.

John Ganson, for the plaintiff.

By the Court, SILL, J. That the plaintiff stood in fact, *in loco parentis*, to Mary Ann Campbell, that she was his *adopted* daughter, there is no question. The defendant's first point rests solely upon the supposition that the plaintiff was bound to go farther, and show a legal right to stand in this relation to her, and that the proof was insufficient to establish it. The right to maintain this action depends upon the relation of master and servant—not of parent and child—and it may well be doubted whether courts will look beyond the relations which actually exist, in an action of this character, for the purpose of inquiring by what right they are sustained. In *Harper v. Luffkin*, (7 *Barn. & Cress.* 387,) the plaintiff was allowed to recover for the seduction of his married daughter, who had separated from her husband, and returned to reside in his family. Lord Tenterden, in that case, said “in many instances married women are in *fact*, hired servants. Such contracts are no doubt liable to be defeated at the will of the husband, but unless he interferes, it by no means follows that the relation of master and servant may not exist, *especially* as against third persons, who are wrongdoers. It appears to me that it did in fact exist in this case. And in the absence of any interfe-

Ingersoll v. Jones.

rence by the husband, *it is not competent to the defendant to set up his right as an answer to the action.*"

In *Edmondson v. Machel*, (2 T. R. 4,) the plaintiff brought an action for an assault and battery upon his niece, by which the plaintiff lost her service, &c. The girl lived with the plaintiff, who was her aunt, though her mother was living. It does not appear from the report of the case that there was any contract between the plaintiff and the mother of the child, giving the former a right to her services, yet the action was maintained.

But it is not necessary to go the length of these cases to maintain the present suit. The girl has not heard of her father in fourteen years, and supposes him dead. The jury and court were justified in coming to the same conclusion. She has by the *permission, at least*, of her remaining parent, resided in the family of the plaintiff as his child, has rendered him service and obedience, and he, in turn, has educated, protected and supported her ever since she was seven years of age. And if it were necessary to prove a contract, this long acquiescence on the part of those who might claim her services, and the performance during this time of the parental duties assumed by the plaintiff, would be sufficient, *prima facie*, for the purposes of this suit, to establish it. The bill of exceptions states that the plaintiff "took her to bring up." This may imply a contract.

For the purpose of prosecuting this suit, the plaintiff stands in the place of a natural parent, which embraces the relation of master, and is entitled to the same kind of redress. (*Irwin v. Dearman*, 11 East, 23.)

2. The conclusion I have come to on the defendant's first point involves a decision of the second. Exemplary damages may always be allowed in this kind of actions, in the discretion of the jury. After a legal cause of action is made out, they have a right to determine whether the plaintiff and his family have suffered in reputation or otherwise, from the wrongful conduct of the defendant, and to award for such injury, what they may deem a suitable pecuniary redress. The authorities cited by the defendant to this point (24 Wend. 424; 4 Denio,

Ingersoll v. Jones.

461) have no application to the case. In each of those cases the action was brought by the master, for an assault and battery committed by the defendant upon his servant, by which her services were lost. The servant in such case has an action against himself for the assault and battery, and may recover exemplary damages. To allow such damages to be recovered by the master, would therefore subject the defendant to their payment twice. For seduction the servant has no action. This distinction is noticed in the case cited by the defendant's counsel, and the propriety of allowing exemplary damages to be recovered in an action like this is there conceded. In *Irwin v. Dearman*, above cited, the plaintiff was allowed to recover exemplary damages for the debauching of his adopted daughter. And in *Edmondson v. Machell*, the plaintiff was permitted to retain a verdict embracing exemplary damages for an assault and battery upon her servant, who was her niece, upon the latter entering into a stipulation to abandon a suit instituted by her against the defendant for the same cause. 3. Whether Mary Ann Campbell was or was not a servant of Borland when she was seduced is not a material question in this case. If she were, it is no answer to this action. She was the child and servant of the plaintiff at the time of her sickness, and the loss of service and expense resulting from it fell upon him. This entitled him to maintain the action. (9 *John.* 387. 2 *Wend.* 459. 5 *Cowen*, 106. 2 *Barb. S. C. Rep.* 182.) The question presented was a mere speculative one, not affecting the case, and whether the judge decided it right or wrong, or refused to decide it at all, is a matter of no consequence. Charging the jury that the plaintiff's right to recover depended upon his right to the girl's earnings at Borland's was simply giving the defendant one more chance of a verdict than he was entitled to; and of this *he* should not complain. Had the question been material in the case, the judge did right in submitting it to the jury; for it was not clearly and decisively settled by the testimony. 4. The offer to prove, in mitigation of damages, that the defendant had offered to marry the girl, was properly rejected. The plaintiff was not obliged to accept any proposed

Warner v. Hitchins.

compromise for the outrage committed on him and his family; much less to receive the seducer of his daughter as a member of it. He had as good a right to claim that the offer was an insult and aggravation of the wrong, as the defendant had to regard it as a mitigation of the injury. It may well be that the character of his family would suffer still more by such an addition. Had a sum of money been offered, (although its recovery is the only reparation the law can make,) clearly proof of such an offer would not have been received in mitigation of the recovery; much less any other proposition for a compromise. It is to be remembered that this action is brought by the parent for the injury to him, and not by the daughter to recover an equivalent for her character. If this were a case where the question could arise, it might perhaps be said that she could not be heard to allege that the man whom she had admitted to her embraces was unfit to become her husband; but no such argument is admissible against the parent.

A new trial must be denied, with costs.

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ERIE GENERAL TERM, November, 1849. *Mullett, Sill, and Marvin*, Justices.

WARNER vs. HITCHINS and LEONARD.

Where a lease contains a covenant on the part of the lessees to surrender up the possession of the premises, at the expiration of the lease, in the same condition they are in at the date of the lease, natural wear and tear excepted, but there is no covenant to repair or rebuild; and the buildings are destroyed by fire during the continuance of the term, the tenants are not bound to put up new buildings in the place of those destroyed.

But where fixtures attached to, and constituting a part of the demised premises, are severed by the fire, and are subsequently carried away by the lessees and not returned, they do not thereby lose their identity, but are fairly within the agreement to surrender at the end of the term; and the lessor may recover their value, in an action upon the lease.

Warner v. Hitchins.

ON the 15th day of May, 1844, the plaintiff, by an agreement not under seal, leased to the defendants a tannery, with its appurtenances, in the village of Lockport; the term to commence on the first day of September, 1844, and to end on the first day of September, 1847. The lease contained, on the part of the defendants, an express agreement to pay the rent, and not to assign without the plaintiff's consent, and also a clause in the following words: "*And also at the expiration of the lease to surrender up the possession of the said premises, in the same condition the same now are, natural wear and tear excepted.*" The lease contained no other express stipulations on the part of the defendants. They went into possession under it, and in January, 1846, the buildings on the premises were destroyed by accidental fire, and have not been rebuilt. Certain fixtures on and a part of the premises leased were severed by the fire, and were subsequently taken off by the defendants and not returned at the time of, or since, the expiration of the term created by the lease. The plaintiff claimed that the defendants were bound to put up new erections; and this action was brought to recover the value both of the property destroyed by the fire and of that removed. The jury assessed separately the damages upon each of these alleged causes of action, and a verdict was taken for the plaintiff subject to the opinion of the court.

J. L. Curtenius, for the plaintiff.

E. J. Chase & L. F. Bowen, for the defendants.

SILL, J. The most important question in this case arises upon the stipulation in the lease, by which the defendants bound themselves *at the expiration of the lease to surrender up possession of the premises in the same condition they were in at the time of making the lease, natural wear and tear excepted*. Except in one case in the court of appeals of Virginia, I can find no direct adjudication upon this precise question. Substantially the same point was presented to our su-

Hitchins v. Warner.

preme court, in the case of *Cook v. The Champlain Transportation Company*, (1 *Denio*, 91;) but that case passed off upon another point, and the court gave no opinion on the one here presented. At common law tenants were not liable in waste for losses by accidental, or even negligent fires. By the statute of Gloucester, lessees for life or years were made liable for such losses. The law was again changed, by the 6 Elizabeth, which provided that lessees should not be liable for the loss of buildings which were destroyed during the term by accidental fires, except in cases of special agreement between landlord and tenant. (1 *Coke's Rep. by Thomas*, 644, note 19. *Arch. Land. and Ten.* 17. 3 *Chit. Black.* 229, note.) And so the English law stood on the subject down to the time of the revolution.

It was at first doubted, under the statute of 6 Elizabeth, as will be seen by reference to the authorities cited, whether an *express covenant to repair* bound the tenant to make good losses by accidental fires. And the practice of inserting a clause excepting such losses from the operation of the covenant was at first adopted by conveyancers in England, on account of this doubt, and to avoid any question about it, and not because the covenant without the exception was understood clearly to extend to such casualties. It is now however settled, that when the lease contains, on the part of the lessee, an *express covenant to uphold and repair* the premises, he is liable to make good such losses. But in all the adjudicated cases where this liability has been held to attach to the lessee, he has entered into an *express covenant to repair*; and in all those cases in which the same lease has also contained a covenant to surrender the premises in the same condition, or in as good condition, as at the commencement of the term, this covenant has not been noticed by the court as important, but the *covenant to repair* has been made expressly the basis of the recovery. In some early cases, where the lease contained no covenant on either side about replacing buildings casually destroyed, courts of equity restrained the lessor from collecting rent after such losses, or apportioned the rents according to the diminished value

Hitchins v. Warner.

of the demised premises. But the rule in such cases is now settled, that if there is an express stipulation on the part of the lessee to pay rent, he is bound to pay for the whole term, and the lessor must suffer the injury to the reversion. (*Holtzapfel v. Baker*, 18 Ves. 115. *S. C. at law*, 4 Taunt. 45. *Patterson v. Ackerson*, 1 Edw. Ch. Rep. 96. *Fowler v. Botts*, 6 Mass. Rep. 63. *Hallett v. Wylie*, 3 John. 48.) The equity of this rule apportioning the loss in some degree according to the interests of the parties, has induced the courts to adhere to it, unless different obligations have been expressly and clearly assumed by the respective parties. Whether these defendants have assumed a different liability is the inquiry in this case.

The intention of the parties prevails over the literal terms of an agreement, when its language is not in accordance with their actual design. To ascertain this intent, we are to look at the situation of the parties; the subject matter of the agreement; the object that the parties had in view and intended, at the time, to accomplish. A construction should be avoided, if it can be done consistently with the tenor of the agreement, which will be unreasonable or unequal. (14 *Verm. Rep.* 311.) And that construction which is most obviously just is to be favored. (4 *Humph.* 468.)

The question in the present case comes to this, whether the defendants are liable on their agreements, to the same extent as though they had covenanted to repair and uphold the premises during the time. "Upon a covenant by the lessee to *keep in repair and leave* the premises in the same state as when he found them, he is merely required to *use his best endeavors* to keep them in the same *tenantable repair*. Natural and unavoidable decay is no breach of the covenant; but a covenant to *repair generally* requires him to uphold the buildings." (*Com. L. & T.* 202.) "If one covenant to keep and leave a house in the same or as good plight as it was at the making of the lease, in this case the ordinary and natural decay is no breach of the covenant. But the covenantor is bound to do his best to keep it in the same plight, and therefore is bound to keep it covered," &c. (*Shep. Touch.* 169.) The same book also lays

Hitchins v. Warner.

down the rule that upon a covenant to repair generally, the lessee is liable to make good losses by casual fire. These authorities show that a covenant to repair differs in its effect from a covenant to surrender in the same condition ; and is more extensive in its application. They point to the office and design of these covenants respectively. The stipulation to repair is the proper one where the lessee assumes to keep and make the premises good, from whatever cause the injury may arise, whether from unavoidable accident or negligence. And the covenant to surrender in the same condition is adopted when the object is to secure the utmost care and diligence of the lessee in protecting and preserving the property. The same principle is laid down in 6 *Vin. Ab.* 406, *tit. Cov. L. 4, § 3*. "Covenants ought to be construed according to the intentions of the parties; as if one covenant *to leave all the timber* upon the ground at the expiration of the term, and after cut it down, it is a breach of the covenant, though he take it not away. But if a stranger cut it down it is no breach of the covenant." In this last case the leaving the timber on the ground, though cut down, was a literal compliance with the covenant ; but it was held that the real intention was that it should be left standing. The covenant was also in terms absolute, that the timber should be left on the ground, not excepting injuries arising from casualties, or the interference of strangers. Still it is held, that according to the intention of the parties it imposed upon the covenantor only due diligence and care in preserving the timber, and abstinence from any act on his part productive of injury to it. In the same book, title *Covenant, L. 5, § 2*, it is said, "If a man covenant to leave the land as he found it, and the wind tears up the trees by the roots, the covenant, as to this, is void." In other words, there is no breach, because the parties did not intend that the covenant should cover such an injury ; for I shall have occasion to show that if the case were clearly within the intent of the parties, the law does not make such covenant void, but the covenantor would be responsible in damages.

In *Pollard v. Shaffer*, (1 *Dallas*, 210,) the lessee covenanted

Hitchins v. Warner.

to keep the premises in good repair during the term, and at its expiration to surrender them up in like good repair. At the end of the term the premises were in the possession of the British army, by whom the buildings had been partially destroyed. It was held that the covenant was not broken. It is proper to say that on account of the express covenant to *repair*, the soundness of this case has been questioned. And it is upon this ground alone, I apprehend, that the correctness of the decision has been doubted. In *Ellis v. Welsh*, (6 *Mass. Rep.* 246,) the defendant had leased to the plaintiff a store, and covenanted that he "should hold and occupy the same for five years from," &c. During the term part of the premises on which the building stood was taken for a street. It was held that the covenant did not extend to such a disturbance, and was not broken. The same question was decided the same way in *Frost v. Ernest*, (4 *Whart.* 86;) and the same point has also been so decided in several instances by our supreme court. In *Knickerbacker v. Killmore*, (9 *John.* 106,) the action was covenant by the assignee against the assignor of a lease. The assignment to the plaintiff purported to sell, assign, transfer and set over to him, all the parcels of land and premises described and contained in the lease, to have and to hold the same to the plaintiff, in as ample a manner to all intents and purposes as the assignor himself might or could hold or enjoy the same; and also contained a covenant by the assignor to the assignee in the following words: "And further, that I do covenant with the said P. K. that I have good and lawful right to bargain and transfer the said premises as above written." The plaintiff was evicted by title paramount to that of the assignor, and the court held that the case was not within the covenant, which was intended only as a covenant against the acts of the covenantor. In *Graves v. Clark*, (8 *Cowen*, 36,) the action was upon an implied covenant in a lease. The court said that the words *demise and grant* implied a covenant upon the part of the lessor, that the lessee should have quiet and peaceable possession of the demised premises, on the day the term commenced. On that day there was a person in pos-

Hitchins v. Warner.

session without right, who refused to give it up. It was held that the covenant was not broken. For, although the covenant implied would strictly embrace the case, it was by construction limited to a case of holding out by the lessor, or some one having title. *Gardner v. Keteltas*, (3 Hill, 330,) presents the same point, (the covenant in that case being express,) and the decision is the same. In *Dudley v. Folliot*, (3 T. R. 584,) the action was upon a covenant in a deed of conveyance of land lying in the state of New-York. The defendant covenanted that he had the legal title, and that the grantee, his heirs and assigns, should and might forever thereafter peaceably have, hold, occupy, possess and enjoy the premises with the appurtenances, &c. without the let, trouble, hindrance, molestation, interruption or denial of him the defendant or his heirs, or of and from *all and every other person or persons whomsoever*. The state of New-York had seized the land as forfeited by acts of the grantor, done prior to the execution of the deed, and possession by the grantee could not for this reason be obtained. The court of king's bench decided, that the covenant was only against lawful interruptions, and not recognizing the proceedings of the state as legal, held that the covenant was not broken. In *Stanley v. Hays*, (3 Adol. & Ellis, new series, 106,) the action was upon a covenant for quiet enjoyment during the term. The lessee's property was distrained for a tax assessed on the land, before the lease was made, and which the lessor was bound to pay. It was held there also that the covenant was not broken, and that it extended only to a disturbance by one having an interest in the land demised.

In *Lindsey v. Gordon and others*, (1 Shepley, 60,) the action was for refusing to deliver to the plaintiff a vessel for which, upon a sale to them, he had received the notes of the defendants. They agreed "to keep said vessel in good order, and to deliver her up to said Lindsey, or his order, on failure by us to pay the notes aforesaid, or any one of them." The vessel was lost at sea. And the court said the vessel being lost without the defendants' fault, the re-delivery was excused, and no action lay against them therefor.

Hitchins v. Warner.

Cases in principle like these, almost without number, might be cited; and I refer to them, not claiming that the analogy between them and the present case is so decisive as necessarily to dispose of it, but for the purpose of bringing directly before the mind a few examples, where the unquestioned terms of the contract have been made to yield to what the courts have deemed the intentions of the parties, and showing how freely and extensively the power of conforming the language of an agreement by construction, to the actual design of the parties making it, has been always exercised by the courts. In all the cases cited, the departure from the language of the contract, was as great, and in some far greater, than the defendants propose here.

The construction applicable to covenants like most of those before the courts in the various cases cited, has long been settled and understood. But when the questions there decided were first presented, I know of no argument that can now be used against the defendants in this case, which would not have applied then with equal if not greater force. The difficulty is not that the principle is now for the first time asserted, but that we are now for the first time called on to apply it to a case like the present.

In looking at all the circumstances of the case, I am satisfied that neither party contemplated, at the time the lease was executed, that the tenants were to rebuild the erections, in case of their destruction by fire. This liability is an extraordinary one for the lessee to assume, and when it is intended, it is usually expressed in terms not susceptible of misconstruction. The covenant to repair has been in use for centuries; its appropriate office and design is understood, not only by lawyers but laymen, and its omission is a strong reason for supposing that neither party intended, by other provisions, to assume or impose the obligations which it creates. The covenant to repair has always been regarded as imposing a more extended liability, than the covenant to surrender the premises in as good condition as found. And the insertion of the latter covenant has never been considered as superseding the necessity of the former

Hitchins v. Warner.

when the intention is to charge the tenant with repairs; even those not made necessary by casualty. The damages claimed by the plaintiff, are all he would be entitled to under an express agreement to repair and uphold the premises during the term; and to give him this remedy, we must virtually interpolate a stipulation to that effect by the side of those which the parties themselves have placed in the lease. It is only by implication that a contract to surrender the premises in the same condition, can be held to bind the lessee to rebuild; thus enlarging instead of restraining the signification of the words of the agreement, for which I find no authority. "Where one covenants expressly to perform certain acts, he *does not*, by *implication*, covenant to do every act, convenient or necessary for the performance of the express covenant. The courts will not imply a covenant which is merely a convenient addition to what is expressed." (*Ashdne v. Austin*, 5 Ad. & El. 671, N. S.)

Again; the language here used is that the *said premises* shall be surrendered in the *same condition*—not in *as good* a plight or condition. I am not about to attempt a subtle distinction between the legal signification of these terms; for where the intention is clear the obligation imposed would probably be the same, whichever phrase was used. But when we are trying to present to our minds the views that occupied those of the parties when the contract was made, the form of expression used by them, may in some degree aid us in the attempt. Had they intended to provide for such a casualty as happened, and not merely for the protection and preservation of the building then standing, it would have been much more natural to provide for leaving the premises in as good a condition, than for surrendering them in the same condition. This form of expression tends to show that the contingency of a destruction by fire was absent altogether from the minds of the contracting parties; or, if it was thought of, that a stipulation in relation to it was intentionally omitted. It is not claimed that this is a controlling circumstance in the case, but with others it is worthy of consideration in our inquiry after the object which the insertion of this stipulation in the lease was proposed to secure.

Hitchins v. Warner.

Again ; it is to be remarked that the obligation which the plaintiff asserts is a hard and unequal one. It is in itself unreasonable and inequitable, and entirely different from any liability which the law, in the absence of an express agreement, imposes on a tenant. To subject him to such liability his agreement should be explicit, and free from doubt. Had the *plaintiff* agreed, in the lease, that during the term the *defendants* should quietly and peaceably have, use and enjoy the land and buildings demised, the words of such an agreement would as plainly obligate the plaintiff to put up new erections, as the terms of the defendants' contract would subject them to that burden. The cases cited above, and numerous others, show that no such liability would rest upon the lessor, and that nothing short of an express covenant to repair or rebuild, would impose this obligation on him. It would be hard indeed if the lessee is to be held by a rule of construction which the lessor is at liberty to repudiate.

We are referred to the rule that the terms of a contract are to be taken most strongly against the covenantor, and are told that the exception in the case of ordinary wear and tear, should be interpreted as excluding an intention to make any other exception. That such have been laid down as rules of construction is not to be denied. The cases I have referred to show how easily and how frequently these rules have been departed from, and that their influence is allowed, when it leads to a just and equitable construction. In my opinion, they should never be allowed to lead the court to an inequitable or harsh one. But the answer to the argument is, that these rules are subordinate to principles ; that the intention of the parties is to be sought after and effectuated by the court.

I do not propose to examine, in detail, the cases cited by the plaintiff's counsel to sustain his position. So far as they are claimed to bear directly on the question they are all, as before remarked, cases where the lessor had *covenanted to repair*, and are for this reason distinguishable from this case. Shepherd's Touchstone, 173, has also been cited as an authority for holding the defendants liable. It is there said, " If one covenant to

Hitchins v. Warner.

repair houses or banks, *or covenant to leave them in as good case as one doth find them*, and the houses are burnt, or blown down by a tempest or the like accident, in this case the covenant is not broken by the accident only; but if the covenantee doth not repair and make up these things in a convenient time, the covenant will be broken." It is urged that this author intended to lay down the rule that the lessee would be liable to repair on a covenant like the present agreement. The authorities cited by Shepherd, and upon which his remarks are founded, are Dyer, 33, 40 Edw. 3, 5, and Plowden, 29. A reference to these cases shows that no such thing was intended, but that he was speaking of the *time when*, in such cases, the covenant would be considered broken. The case in Dyer shows that there was an express covenant "to sustain and repair the banks to prevent the water from overflowing." The banks were broken down by a great and sudden flood, and although the terms of the contract required the defendant to *sustain* the banks, and *prevent* the water from coming in, still the court held that the covenant was kept by repairing within a convenient time, and that it was not broken until such time had elapsed. The decision in 40 Edward, is stated in Fitzherbert's *Natura Brevium*. In that case there was also a covenant to repair *and* surrender in good repair. And the question was whether the covenant was broken before the end of the term, if in the mean time the lessee neglected to make repairs; and it was held it was not. What is said in Plowden is as follows: "If houses are leased for years, and are thrown down by the violence of the wind, the law will excuse the lessee in waste. But if he covenants to repair *and* leave them in as good repair at the end of the term, an action of covenant will lie against him for the repairing thereof, for *the special agreement alters the law*." This also is said by the counsel arguing, and not by the court; although its correctness will not be questioned. The author of the *Touchstone* intended to state the principles laid down in these cases, and they show what he meant. What he says is applicable to a case in which there is a covenant to repair *and* surrender in good repair, and not to the latter stipulation standing alone. In late

Hitchins v. Warner.

editions of the Touchstone, 1 Coke, 98, and 5 Coke, 15, are added to the authorities cited by Shepherd himself; but they have no application to this case. Authorities were referred to on the argument, showing, *as was conceded*, that upon a contract like this, no liability will arise when the loss happens by the act of God. It was said on the part of the plaintiff, that the law made a distinction between such a case and the present one, and *excused* the breach when the covenant became impossible to be performed from providential causes. There has been language used by some elementary writers, and in some of the cases, furnishing plausible grounds for this argument. But in my opinion no such distinction in principle really exists. The rule is, that if at the time the covenant is entered into, circumstances exist which show that it is impossible that it can be performed, it is void. "But if the covenant be within the range of possibility, however absurd or improbable the idea of the execution of it may be, it will be upheld; as where one covenants it shall rain tomorrow, or that the pope shall be at Westminster on a certain day. To bring the case within the rule of dispensation it must appear that the thing to be done cannot by any means be accomplished; for if it be only improbable, or out of the *power of the obligor*, it is not in law deemed impossible." (*Beebe v. Johnson*, 19 Wend. 502. 3 Com. Dig. 93. 1 Roll. Abr. 419.) When the law creates a duty, the party is excused if it becomes impossible to perform; but when he takes the charge upon himself, by his own special agreement, if the thing *become impossible* to perform, he is answerable in damages. (*Platt on Cov.* 582.) Mr. Story goes so far as to say that, if a man contract to perform an impossibility, he is liable in damages resulting from the non-performance. (*Story on Cont.* § 668.) The doctrine of this and other authorities is this: A contract to do a thing, or that a certain thing shall or shall not happen, is binding, provided performance is not at the time of entering into the contract impossible. An agreement that buildings or trees standing on demised premises shall not be destroyed during the term from providential causes is not void; and if they are blown down by a tempest or de-

Hitchins v. Warner.

stroyed by lightning, the covenantor is liable in damages. The question in all these cases is how far the parties intended the covenant to extend; and where it has been incautiously said by courts that the law will *excuse* non-performance, when by the act of God performance has become impossible, the real defence has been that the parties did not by their contract intend to provide against such losses, and hence the agreement was not broken. Courts may be less inclined to hold that providential losses were within the intent of the parties, than those arising from other causes; but when the intent is ascertained, the principle of law applicable in either case is the same. If this case were to be determined without reference to any decisions other than those already noticed, I should be of the opinion that the defendants were not liable for the building destroyed. But there are some other cases which seem to me to bear directly upon the question, to which I will now refer.

It has been decided by the courts of the state of Tennessee, where A. covenanted to deliver B. his growing crop of cotton "in good order put up in bags," that A. was not bound to deliver the cotton free from stains, and of a fair quality. He was only bound to use his *utmost care in putting, ginning, and baling* it. And that he did not guaranty against the casualties of the season. (*Trigg v. Hally, 4 Humph. 493.*) Here was an express contract to deliver in good order, which was not according to its terms, performed. Yet the court, looking at the intent of the parties, hold that the real understanding was that A. should use his utmost care in preserving the property, and was not liable for casualties. A contract to deliver cotton, and one to deliver the possession of a house, are alike in character, and if a guaranty against casualties is not implied in one, upon what principle can it be implied in the other? If the cotton had been destroyed by flood or fire, without the defendant's fault, I am unable to see why, upon the principle of that case, he would not have had equally a defence.

The hirer of a slave covenanted to re-deliver him to the bailor at the end of the term. During the term the bailee moderately corrected him for misconduct; upon which the slave ran away,

Hitchins v. Warner.

and notwithstanding due diligence on the part of the bailee to recover him, he escaped and was not delivered to the bailor. It was held that the bailee was not liable on his covenant for the value of the slave. (*Graham v. Swearingin*, 9 *Yerger*, 276.) The principle of this case cannot be misunderstood. The covenant to return the slave was in terms unconditional, and literally it was broken. But it was construed to be only an undertaking on the part of the bailee to use his utmost care and diligence to keep and return the slave. In the court of appeals of the state of Virginia construction was given to a covenant like the agreement before us. A lessee covenanted "to return the property, with all its appurtenances, at the end of the term." During the continuance of the lease a grist mill and saw mill and carding machine, a part of the demised premises, were consumed by fire, and the lessor brought his action on the covenant, for the value. It was held that it was merely a covenant not to hold over, and the lessee was not responsible for the property destroyed. Upon this point the court say, "to bind him to something so unequal and so contrary to the obligations imposed by the common law, his covenants ought to be *special and express*, and so clear as to leave no doubt that he intended to take this duty or charge on himself. Nothing should be left to vague inference or doubtful construction. (*Maggort v. Hansberger*, 8 *Leigh*, 532.) These decisions I conceive to be directly in point; and though not binding authority, are entitled to high respect, and I am unable to discover that they are not sound in principle.

In *Browning v. Hanford*, (5 *Hill*, 596,) a question somewhat like the one before us was presented to the court, though not decided. Property had been levied on by a sheriff, and delivered to one Ellsworth, from whom he took a receipt, and an express agreement to re-deliver it on demand or pay \$2000. The property was destroyed by fire while in Ellsworth's possession. Judge Nelson and Judge Cowen differed on the question of the receptor's liability. Upon this point Judge Bronson gave no opinion. The case is not therefore cited as authority, but the reasoning of Mr. Justice Nelson is referred to as favoring the

Hitchins v. Warner.

views I have taken of this case. He said the contract was not to be construed to make the defendant liable for losses arising from unavoidable calamity, and that the view was sustained by a respectable body of authority. We are also reminded by the plaintiff's counsel, that a contract should, when susceptible of two constructions, receive that which will make it legal and operative, rather than that which will render it illegal and nugatory; and we are told that this rule will be infringed, unless the defendants are held liable for the property destroyed; that a different construction will bind them to no duty which the law itself does not impose. And hence the agreement will be inoperative. A contract is not inoperative within the meaning of this rule simply because the obligation it imposes is the same which the law implies. A bond or promissory note, by which a party binds himself to repay borrowed money on demand, is neither nugatory nor inoperative. Yet the same liability is in such case implied by law, which is expressed by these instruments. No case, I apprehend, can be found where a more comprehensive interpretation has for this reason been given to a contract than it would otherwise receive. On the contrary, the reasoning of Mr. Justice Nelson in *Brown v. Hanford* tends to the conclusion that where the language of a contract is appropriate to express a duty which the law imposes, it should not be construed to create an additional obligation. After a most careful examination of the question, I am of the opinion that the defendants were not bound by their agreement in the lease to put up new buildings in the place of those destroyed.

As to that portion of the property not destroyed, but removed from the premises, I think the plaintiff is entitled to recover. The objection that a breach for this cause was not assigned in the declaration seems to me not well taken. This property was a part of the premises demised to the defendant, and was in existence at the end of the term, or at least was *removed* by the *defendants* before. Nothing was shown to excuse them from returning it. I do not understand that the plaintiff is driven (as has been contended) to his action of trover for it. He might maintain such an action probably; but I think he is at

 McKnight v. Lewis.

liberty to elect to go on the agreement. Numerous cases might be cited where a lessee has been held liable on his covenant for property severed from the freehold by him and carried away; and this property, a portion of it having been severed by the fire, did not lose its identity, but remained a portion of that covered by the lease, and was fairly within the agreement to surrender at the end of the term. Had there been no such agreement, the plaintiff would have been left to his action on the case; but as it is I think the suit for the claim may be sustained.

The plaintiff must have judgment for the value of the property which the defendants have removed and not returned, which the jury found to be worth \$275.

MULLETT, P. J. concurred.

MARVIN, J. dissented.

SAME TERM. *Before the same Justices*

McKNIGHT, adm'r, &c. vs. LEWIS.

5b	681
76 AD	448

The protest and certificate of a deceased notary public are presumptive evidence of the presentment of a note, and of non-payment and notice to the endorser; notwithstanding the endorser, when sued upon the note serves an affidavit with his answer, denying that he ever received notice of non-payment.

The certificate of an officer, when by law evidence for others, is competent testimony for the officer himself, provided he was, *at the time of making it*, competent to act officially in the matter to which it relates.

Accordingly, where a notary public protested a note, in which he was not interested at the time, but he afterwards became the holder thereof, *held*, that in a suit upon such note by his personal representative, after his death, the protest and certificate of the notary were competent evidence in behalf of the plaintiff.

Where a notice of the protest and non-payment of a note is in form good, and has upon its face all the requisites of a legal notice, but *misdescribes* the note, the question to be determined is not one of law as to the sufficiency of the notice, but is a question of fact, whether the endorser was misled by the mistake.

McKnight v. Lewis.

THIS was an appeal from a judgment of the recorder's court of the city of Buffalo. The action was brought by the plaintiff as administrator of James E. McKnight deceased, against the defendant as endorser of a promissory note of which the following is a copy :

"\$150.

Buffalo, 30th April, 1847.

Sixty days after date, I promise to pay to the order of Samuel Lewis, one hundred and fifty dollars, value received, at O. Lee & Co's Bank.

(Signed) ANDERSON DECKIE.

(Endorsed) SAMUEL LEWIS."

For the purpose of proving the dishonor of the note, and notice to the defendant, the plaintiff proved that when the note fell due, it was owned by one Truscott, from whom the intestate afterwards purchased it, and that at the time the note matured, James E. McKnight, the intestate, was a notary public residing in the city of Buffalo ; and he read, under an exception taken by the defendant's counsel, a protest and certificate under the hand and seal of the intestate, annexed to the note, made prior to the time when he became the owner of it. From this certificate it appeared that the note had been dishonored, and due notice given to the defendant. The defendant's answer denied presentment and notice of the non-payment of the note ; and with it was served an affidavit made by the defendant, stating that he had never received notice of its non-payment. The defendant introduced on the trial a notice which he claimed was the one served on him, as stated in the certificate of protest, which notice was as follows :

"\$34,88.

Buffalo, N. Y. July 2d, 1847.

Please to take notice, that a note dated April 30, 1847, for thirty-four dollars 88 cents, drawn by Anderson Deckie and endorsed by you, was this evening protested for non-payment, payment having been demanded and refused. The holders thereof look to you for payment. Your obt. servt.

(Signed) J. E. MCKNIGHT, Notary public.

To Samuel Lewis."

(Addressed on the outside) "SAMUEL LEWIS, Esq. Buffalo."

McKnight v. Lewis.

The defendant's counsel insisted that as a matter of law the misdescription of the note in the notice was fatal, and that the defendant for this reason was not charged as endorser; and he asked the recorder so to decide. The recorder refused, and held that it presented a question of fact whether the defendant was misled by the misdescription; and the defendant's counsel excepted. The cause was tried without a jury, and the recorder found in favor of the plaintiff, and ordered a judgment for the amount of the note.

The points made by the appellant were, 1. The affidavit of the defendant, served with his answer, destroyed the efficacy of the notarial certificate, as evidence. 2. Although the revised statutes make the protest and certificate of a deceased notary public presumptive evidence of presentment of a note and non-payment, and notice to the endorser, still they are not competent in behalf of the administrator of the deceased notary. 3. The notice of non-payment misdescribed the note, and was therefore legally insufficient to charge the defendant. The court erred in not so deciding, as a matter of law. In the court below the proper exceptions were taken to raise these questions.

E. Cook, for the appellant.

D. Tillinghast, for the respondent.

By the Court, SILL, J. By the revised statutes public notaries are authorized to demand payment of promissory notes, and to protest them for non-payment. (2 R. S. 283.) Section 45 of this statute declares, however, that neither such protest, nor any note thereof, made by any notary in this state, shall be evidence in any court in this state, except in the cases specified in the next section. One of the cases specified in the 46th section, is the death of the notary, and in this event his protest is, upon proof of his official seal and signature thereto, made presumptive evidence of the demand of payment as stated therein. And section 47 declares that any note or memorandum made

McKnight v. Lewis.

by the notary at the foot of the protest, or in any regular register of official acts, in his hand-writing or signed by him, shall (in case of the notary's death) be presumptive evidence that notice of non-payment had been given at the time and in the manner therein stated.

The defendant's counsel contends that by the service of the affidavit with the answer the certificate of the notary was rendered, by a statute enacted in 1833, ineffectual as evidence for any purpose. In this he is most clearly mistaken. By the revised statutes, neither the protest of a promissory note, made by a notary in this state, nor his certificate, was evidence in any court in this state, except in cases where the personal attendance of the notary on the trial, or his testimony, could not be procured in any mode provided by law. In 1833, these protests and certificates under the official seal and signature of the notary, were declared presumptive evidence of the facts stated in them. (*Laws of 1833, ch. 271, § 8.*) But the same section containing this provision, declared that it should not apply to cases in which the defendant with his plea served an affidavit, like that served with the answer in this case.

The effect of serving such an affidavit is to deprive the plaintiff of the benefit of the certificate as evidence, so far as it derives its efficacy from the 8th section of chapter 271 of the laws of 1833; but it in no way impairs its force or competency as testimony under the revised statutes. The protest and certificate at its foot were therefore properly admitted as evidence, notwithstanding this objection, and proved presumptively, dishonor of the note, and notice to the defendant.

The next objection is that the official protest and certificate of the intestate were admitted in evidence in favor of the plaintiff, who is his representative. At the time J. E. McKnight made this protest and memorandum of notice at its foot, he had no interest in the note. He had authority by law, and was competent in the particular case, to present and demand payment of it and to give the notice of refusal, and also to make officially the protest and memoranda which, in a certain contingency, the statute had declared presumptive evidence of such dishonor

McKnight v. Lewis.

and notice. The certificate of an officer, when by law evidence for others, is competent testimony for the officer himself, provided he was competent, *at the time of making it*, to act officially in the matter to which it relates. This doctrine is applied daily in cases of justices of the peace, sheriffs, constables and other officers. No one will doubt that a commissioner of deeds or judge, who takes and certifies the acknowledgment of the execution of a deed conveying land, and who subsequently purchases the same land, may use his own certificate to prove the execution of the conveyance to his grantor.

Witnesses who have been examined and afterwards become interested, and are made parties in the same suit, have been permitted to read their depositions in their own favor, upon the ground that when they were examined they were not incompetent to testify in the cause as witnesses. (*Goss v. Tracy*, 1 P. Wms, 287; *same case*, 2 Vernon, 699. *Haws v. Hand*, 2 Atk. 615. *Glynn v. The Bank of England*, 2 Ves. sen. 42.) The application of this doctrine to this case shows that the protest and certificate were properly admitted in favor of the plaintiff, although he was the representative of the person who made them. The remaining point is made upon the notice of protest and non-payment of the note. The defendant's counsel assuming, (whether by authority or not we need not now inquire,) that the notice produced is the same that the certificate of the notary proves to have been served, insists that it is, as a matter of law, insufficient to charge the defendant. We are upon this point referred to the unreported case of *Dole v. Gold*,^(a) decided by this court, and in which the defendant was discharged on account of the insufficiency of the notice. That case was unlike this. The notice there was defective on its face; omitting an essential statement indispensable to the validity of a notice to charge an endorser in any case. Here the notice is in form good. It has upon its face all the requisites of a legal notice, but misdescribes the note to which it is claimed by the plaintiff to refer. The present case is in principle like that of

(a) See ante, p. 490.

Jemison v. Blowers.

The Cayuga Co. Bank v. Warden, (1 Comst. 413,) in this particular, and that decision must control ours upon this point. How the authorities stand upon this question, independent of the case referred to, it is not necessary, if it were proper, at this time to inquire. The question was accordingly one of fact, whether the defendant was misled by the mistake in the notice, and the finding of the court below on this question disposes of it.

Judgment affirmed, with costs.

SAME TERM. *Before the same Justices.*

JEMISON vs. BLOWERS and others.

Covenant for quiet enjoyment, contained in a deed, is discharged by a certificate in bankruptcy, where the breach happens after the filing of the petition upon which the certificate is granted.

The claim of the grantee, upon such a covenant, before breach, is a "contingent demand" against the grantor, provable under the second clause of the fifth section of the bankrupt act.

DEMURRER to pleas. The defendants, by deed dated August 28, 1841, containing the usual covenants of warranty and for quiet enjoyment, conveyed to the plaintiff a piece of land in Gainesville, Wyoming county. On the 1st day of March, 1843, the plaintiff was evicted by title derived under a mortgage, which was an incumbrance on the land at the time of the conveyance. And the action was brought on the covenant in the deed, to recover the damages for the eviction. The defendants pleaded discharges in bankruptcy obtained Nov. 6, 1843, upon petitions filed July 4, 1842. To these pleas the plaintiff demurred, and the defendants joined in demurrer.

Jemison v. Blowers.

L. W. Thayer, for the plaintiff.

J. R. Doolittle for the defendant.

By the Court, SILL, J. The point presented in this case is whether a covenant for quiet enjoyment is discharged by a certificate in bankruptcy, when the breach happens after the petition is filed upon which the certificate is granted. No other question was made on the argument, and I shall not inquire whether the plea is in other respects sufficient. The certificates in terms declare the persons to whom they are granted discharged from all debts, contracts, and engagements, existing at the time of filing their petitions, and relate back to that period. I shall therefore lay out of view the fact that the covenant was broken and the liability upon it rendered absolute before the defendants actually obtained their certificates, and inquire whether the claim on the covenant, before breach, was a "contingent demand" provable under the act.

Section four of the bankrupt law provides that the "discharge and certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all *debts, contracts and other engagements*, of such bankrupt, provable under this act," &c. Section five provides first, that "*all creditors coming in and proving their debts under such bankruptcy in the manner herein prescribed, the same being bona fide debts*, shall be entitled to share in the bankrupt's estate," &c. The fifth section then further declares, that "*all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, endorsers, bail, or other persons having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right where these debts and claims have become absolute, to have the same allowed them. And such annuitants, and holders of debts payable in futuro, may have the present value thereof ascertained under the direction of the court, and allowed them accordingly as*

Jemison v. Blowers.

debts in presenti." These extracts from section five, (which for present convenience, I shall designate the first and second clauses,) embrace all that the act contains, declaring what claims may be proved under it. The first clause allows all persons, having absolute debts against the bankrupt, to prove them, and participate in the proceeds of his estate, and all such debts are confessedly barred by a certificate, whether proved or not, unless they are fiduciary in their character.

Under the first clause, by the settled construction given to similar provisions in the bankrupt laws of England, and the act of congress of 1800, none of the claims enumerated in the second clause of section 5, were provable, among which the claim in question must be classed if provable at all under the act. What is meant by a contingent demand, and whether that term is properly applicable to the demand in question here, is the point presented for decision.

In no other bankrupt act do we find any provision corresponding fully with the second clause of section five of the act of 1841. And to give that clause a liberal construction, will bring within its purview a large class of cases not embraced by any former act relating to bankruptcy, and which have heretofore been excluded, not only by judicial construction, but as was supposed by the policy which governed legislators in framing acts on this subject. These considerations have caused some hesitation before giving our law that comprehensive interpretation, which its language and some of its peculiar provisions would seem to justify. Under the English bankrupt laws and the former law of the United States, unliquidated demands, though arising upon a contract, were not provable. The exclusion of such claims as those even for torts, was not put upon the ground that persons whose demands were liquidated, had stronger equitable claims upon the bankrupt's estate, but upon the ground that they were not within the terms of the act, and that no mode was provided for liquidating uncertain demands, and all were excluded which required, in order to fix the amount, the intervention of a jury. Judgments were always provable, no matter upon what grounds the re-

Jemison v. Blowers.

covery was had, or whether the liability originated in a matter beneficial to the estate or not. (*Ex parte Hill*, 11 Ves. 646.) And when a right of action for seduction existed, and being liquidated and settled by the notes of the party charged, they were admitted to proof. (*Ex parte Mumford*, 15 Ves. 289.) As has been remarked, those demands uncertain in amount were excluded, either because they were not within the terms of the law, or because no mode was provided for their liquidation; or for both these reasons. The first of those objections is rendered, to a great extent, if not entirely, inapplicable to the law of 1841, by the broad terms of the second clause of section five. And the second is obviated by a provision in section seven, by which the amount, as well as the existence of a claim, may, at the instance of a creditor, or of the assignee in bankruptcy, be settled by a jury.

These new and peculiar provisions admonish us of the extended operation the act of 1841 was designed to have upon the liabilities of a bankrupt, and show that adjudications under former acts will afford us little aid in coming to a correct conclusion on the question now before us. It is however said, that the 56th section of the act of 6 Geo. 4, is much like the provision we are considering; and we have been referred to some decisions giving construction to that section, which it is claimed may apply to this case. The section of the English act referred to is as follows: "Debts payable upon a future contingency which has not happened before the issuing of the commission, may be proved and the amount and value being ascertained by the commissioners, or if the value has not been ascertained before the happening of the contingency, the creditor may, after the contingency has happened, prove in respect of the debt and receive dividends with the other creditors, not disturbing former dividends," &c. The English courts have decided that a debt, payable upon a contingency which has not happened, is not provable under this section, because the debt *with* the contingency is not susceptible of valuation. (1 *Montagu*, 44, 141. 1 *Mont. & McArthur*, 415, 422. 1 *Deac*. 115. 4 *Adol. & Ellis*, N. S. 386. 2 *Scott*, 266. 9 *B. & C*. 145.) The English act

Jemison v. Blowers.

is thus rendered in part inoperative, upon the ground that it cannot, in the mode prescribed for administering it, be carried out upon any known legal principle. These cases, however, are not applicable to our statute. Under it the present value of annuities and *absolute* debts payable at a future day, is to be ascertained, and this can be done upon well known principles. But with the English law, and at least a part of the above decisions upon it before them, congress have obviated the difficulty experienced there, and have provided that contingent debts and claims are to be proved as though they were absolute, and after the happening of the contingency which makes them so, the creditor shall receive his dividend.

But the inconvenience of administering the law upon this principle is urged as an argument against this construction. We are told that its application to a case like the present might tie up the bankrupt's estate twenty years, before it would be known whether the claim proved contingently would become absolute, so as to entitle the claimant to a dividend, or the other creditors to a distribution.

We are also referred to section 10, which declares that all proceedings in bankruptcy shall be brought to a close if practicable within two years after the decree declaring the petitioner a bankrupt. The design of this provision undoubtedly was to admonish courts and suitors that all practicable diligence should be used in bringing such proceedings to a termination. But it was not contended, nor indeed could it be, that it was to operate as an absolute limitation of proceedings in bankruptcy. This clause, when read with the whole section, is merely declaratory of the rights of parties to have each case brought to a close with all the expedition practicable, under its peculiar circumstances; but its terms are not, nor is its spirit, inconsistent with any delay which a compliance with other parts of the act may render necessary, or which may be proper to secure or protect the just rights of the bankrupt, or any creditor. Should the case happen which has been supposed by way of argument, and which would be likely to produce such extraordinary delay in the final settlement of the bankrupt's estate, we might, were

Jemison v. Blowers.

there no other answer to the objection, inquire whether the court would not have the power to distribute the burden of the estate, and still in some method preserve the rights of the contingent claimant. Without pursuing the inquiry it is proper to observe that the case supposed is an extreme one, which by possibility might happen, but still is most unlikely to occur; and it has never been considered a safe rule for construing a law, to look only at its operation upon imaginary or improbable cases, to the exclusion of those likely to arise, and more probably in view of the legislature in passing it. But the conclusive answer is that the argument applies not only to this case, but with equal force to others, confessedly within the second clause of section five. Sureties, it must be conceded, may prove against their principals who become bankrupts, before payment; and when such claims become absolute, or, in other words, when they have been compelled to pay, they may receive a dividend. It is not an unusual thing that bonds are given, with sureties, where the liability remains ten or fifteen years; and it is no more extravagant to assume that the claims of sureties will remain contingent upon such a bond fifteen or even twenty years, than to suppose that twenty years will elapse before the grantee of land will be disturbed, where there is an outstanding incumbrance upon it paramount to his title. The same character of objection would apply to almost every case enumerated in the second clause of section five, though perhaps not to the same extent. The argument therefore proves too much. If allowed to control the construction of this section, it would exclude many cases within the express terms and admitted meaning of the statute.

It is also contended that the right of a covenantee, upon a covenant for quiet enjoyment, does not before breach amount to a demand in law, even contingent—that no right in fact exists upon it. The word demand, Lord Coke says, is a word of extent in signification, greater than any other word except claim; and by a release of “all demands, a *warranty*, which is a covenant real, and all other covenants, personal and real, *estovers*, all commons and profits, appender, and conditions,

Jemison v. Blowers.

before they be broken or after, are released and discharged." (3 *Coke by Thomas*, 427.) In a release it seems the word demand, *without qualification*, would include the covenant upon which this suit is brought though not broken.

The legal definition of the word contingent, when applied to various legal rights and interests, can leave but little doubt of its true meaning here. "A *contingent use* is such as may by *possibility* happen in possession, reversion or remainder. (1 *Coke*, *Thomas' ed.* 121. *Comyn's Dig. tit. Uses*, K. 6.) "A contingent remainder is a remainder limited to take effect, either to a dubious and uncertain person, or upon a dubious and uncertain event, so that the particular estate may chance to be determined and may never take effect." (*Jacob's Law Dict. tit. Remainder*. 1 *Coke's Rep.* 30. 2 *Comyn*, 169. 10 *Coke*, 85.) The word *contingent*, when applied to a use, remainder, devise, bequest, or other legal right or interest, implies that no present interest exists, and that whether such interest or right ever will exist depends upon a future uncertain event. (*See the cases above cited giving construction to the 56th sec. of 6 Geo. 4.*) The legal definition of the word concurs with its ordinary acceptation in showing that the term contingent implies a possibility. The term "contingent demand" would therefore be inapplicable where a present claim exists, or where it is certain to arise in future; and is only appropriate when there is no claim *in presenti*, and when it is uncertain whether any in fact will ever arise.

It seems to me that the grantee of land which at the time of the grant is subject to incumbrances which may defeat it, has before eviction a contingent demand against his grantor upon the covenants for quiet enjoyment in his deed, and that such a demand is provable under the second clause of the fifth section of the bankrupt act.

It is also urged that the plaintiff's claim in this case not having been *actually proved* in bankruptcy, it is not barred; and we are referred to the case of *Wells v. Mace*, (17 *Verm. Rep.* 503,) which is applicable to the point, and, if sound law, goes far to sustain it. Wells signed the note of Mace as surety,

Jemison v. Blowers.

after which Mace obtained his certificate in bankruptcy. After Mace's discharge Wells paid the note, and brought his action against Mace for money paid to his use. It was there held that the action was not barred. In speaking of that part of section five which I have called the second clause, the court say it is permissive, and not compulsory upon the creditors referred to in it; its terms being that the creditor "shall be permitted to prove his claim and not compelled to do so, leaving it optional with him to prove his claim and take his share of the bankrupt's effects, with the other creditors, or to postpone his claim until it becomes absolute by his being compelled to pay and then taking his chance of collecting it of the bankrupt after he has parted with his property." After a careful examination of this question, I have been led to a different conclusion. The principle of the construction laid down in *Wells v. Mace* extends to all the cases enumerated in the second clause of section five, and according to that case none of them are discharged unless actually proved. It will be observed that independently of this clause *debts* only are provable. By virtue of the second clause alone are *contracts* and *engagements* as distinguished from debts provable, and the fourth section discharges not only debts, but all contracts and engagements provable under the act. The words "contracts and engagements" in the fourth section must refer, therefore, to the obligations enumerated in the second clause of section five. Otherwise they are at least redundant, if not entirely without meaning.

It is said that creditors are not, under the second clause, compelled to prove their claims, but are "*permitted to do so*," and from the phraseology an argument is drawn in *Wells v. Mace*, favorable to the conclusion there adopted. But the law is permissive only to those having absolute debts. Proof is prescribed as a proceeding preliminary and conditional to the privilege of participating in the bankrupt's estate. It is nowhere and upon no class of creditors imposed as a duty. And I am unable to see, in the expression referred to, any evidence of an intention to place the creditors enumerated in the clause where it is used

Jemison v. Blowers.

on a footing in this respect different from those referred to in the preceding clause.

In the unreported case of *Campbell v. Perkins*, decided by this court at the February general term in Erie county, in 1848, it was held that a demand for damages for a breach of a contract of a common carrier was barred by a certificate in bankruptcy. It did not appear that the claim had been proved in the bankruptcy proceeding. And although the question was not much argued in that case, I am of the opinion that it was correctly decided.

There must be judgment for the defendants, with leave to the plaintiff to amend upon payment of costs.

Note. Since the foregoing opinion was written, I have learned that the judgment of the supreme court of Vermont, in *Wells v. Mace*, has been reversed by the supreme court of the United States. (*See 7 Howard, p. 172.*)

INDEX.

A

ABATEMENT AND REVIVOR.

1. Where the lands against which the decree in an original suit is attempted to be enforced have been transferred to persons who were not parties to the original suit, that suit can only be revived by an original bill in the nature of a supplemental bill of revivor; and is therefore subject to all the defences appertaining to original bills. *Tallman v. Varick*, 277
2. The defendants in such a suit have a right to set up, by way of answer, and to insist upon, any defence to the relief prayed for which may exist, *ib* the case.

ACCOUNT.

See WASTE, 3.

ACTION.

See AGREEMENT, 17.

BILLS OF EXCHANGE, &c. 6.

MONEY HAD AND RECEIVED.

VENDOR AND PURCHASER, 1, 2, 4.

ACTION ON THE CASE.

1. An action on the case for either a public or private nuisance will be sustained, by proof of a wrongful act done by the defendant, and actual damage resulting to the plaintiff therefrom. *Per* HARRIS, P.J. *First Rep.*

Church in Sch'y v. The Sch'y and Troy Rail-Road Co. 79

2. In both cases the action is founded upon the principle recognized in the maxim *sic utere tuo, ut alienum non laedas*. Hence it is, that acts, in themselves lawful, become wrongful in consequence of the time, or place, or manner of performing them. *Per* HARRIS, P. J. *ib*
3. Where a party is disturbed in the lawful enjoyment of his property, by the wrongful act of another, and he sustains a pecuniary injury thereby, an action on the case lies. *ib*
4. As respects the proof of injury, which is required, it is enough to show that the plaintiff's property has, by the wrongful act of the defendant, been rendered less valuable for the purposes to which the owner has seen fit to devote it. It need not appear that its value would be equally depreciated for any other object. *ib*

See RAIL-ROADS.
SEDUCTION.

ADMINISTRATION.

1. Where administration is granted upon the same estate, in different states, upon what principles is the administration to be governed? *Lawrence v. Elmendorf*, 73
2. It seems to be settled, at least in this country, that the administration of the estate of a deceased person is to be governed by the laws of the state

authorizing such administration. *Per*
HARRIS, J. *ib*

3. The general rule is that the effects of a deceased person are to be administered under the authority of the local jurisdiction in which they are situated. And in such administration respect should be had to the aggregate amount of the estate, and debts, foreign and domestic. *ib*
4. The true principle which should govern, in all cases of double administration, is so to marshal the different funds under administration as to produce equality among all creditors, whether foreign or domestic. *ib*
5. Upon this principle the courts of this state will so control the distribution of funds here, in reference to preferences obtained by creditors of an intestate in another state, as to secure equality among all the creditors. *ib*

ADMISSIONS.

The admissions of an executor or administrator cannot be received in evidence, either as against his co-executors or co-administrators, or as against heirs and devisees. *Elwood v. Defendant*, 398

ADVANCEMENT.

Upon the naked fact that a father buys and pays for land, and has the deed thereof made to an infant child, the inference of law is that it is an advancement to the child, and not a resulting trust in favor of the father. But it is always competent to meet and repel such inference by proof that the father did not intend it as an advancement. In such cases the question is one of intention, entirely. *Per* WELLES, J. *Proseus v. McIntyre*, 424

AFFIDAVIT.

See DEBTOR AND CREDITOR, 3, 4, 5.
DISTRESS, 1, 2.

AGREEMENT.

1. Where a contract grows immediately out of, and is connected with, an il-

legal or immoral act, it cannot be enforced. But if the promise is entirely disconnected with the illegal act, and is founded on a new consideration, it is not affected by the illegality of the act, although it was known to the party to whom the promise was made. *Leavitt v. Blatchford*, 9

2. A promise made in consideration of a loan to enable the borrower to pay an illegal debt, does not arise out of an illegal transaction, and is not connected with it; and the maxim *ex turpi causa non oritur actio* does not apply; unless the statute makes the payment of such debt illegal. *ib*
3. It is a well settled principle of law that if there are different and distinct undertakings in the same contract, some of which are legal and some illegal, the law will sustain the good, and make void only the bad. *Per* EDWARDS, J. *ib*
4. Where there is a security given for the payment of a debt, although the security may be illegal and void, yet if in the same instrument there is a contract to pay the debt, the contract may be enforced. *Per* EDWARDS, J. *ib*
5. Where a contract was made between borrower and lender, for the surrender, by the lender, of notes and securities given by the borrower upon obtaining a usurious loan in the state of New-York, and for giving further time for payment, on the receipt of new securities for the amount; in pursuance of which contract, new notes, made and dated in New-York, were delivered to, and received by, the lender, in the state of C., where he was then staying, who then and there delivered up and surrendered to the borrower the former notes and securities; *Held* that the new contract, as an entire thing, must be considered as having been made in the state of C. *Jacks v. Nichols*, 38
6. And no place of payment being specified in the new notes, and it not being shown that New-York was designated by the parties as the place of performance, or that the new contract was made with a view of being governed by the laws of this state; *Held also*, that the law of the place where the contract was made must govern as to its nature, validity and effect. *ib*

7. And such contract, if valid by the laws of the state where it was made, will not be rendered invalid, here, by reason of usury in the contract for the original loan. *ib*
8. It is competent for the parties to an usurious agreement, to free it from its illegal qualities. The excess of interest may be rejected by the lender, and stricken out of the contract; and the borrower may enter into a new and valid obligation to pay the sum originally loaned, with lawful interest. *ib*
9. This may be done in the presence of the statute of usury, and at the place of the original contract. *ib*
10. Such new agreement is sanctioned as well by the law, as by sound morality. *Per HURLBUT, P. J.* *ib*
11. If the parties to a usurious agreement for a loan, after the making of the same, transfer the scene of their negotiations to another state, where any contract respecting the use of money is valid, which does not violate the principles of natural justice, and they there cancel the securities taken upon the original contract, and make a new one upon the subject of the original loan, re-affirming it, and binding the borrower to pay after a season of forbearance, which forbearance forms a part of the consideration of the new agreement, such new contract is not tainted with usury. *ib*
12. There is a sufficient consideration for such new agreement, in the surrender of securities *prima facie* binding upon the parties; and in the moral obligation resting upon the promiser to refund the money borrowed by him, with lawful interest. *ib*
13. The farm of S. being about to be sold under a decree of foreclosure in favor of H. for about \$430, he applied to B. for assistance to pay the mortgage debt. B. advanced the money, and took an assignment of the bond and mortgage and the decree of foreclosure, in order to prevent a sacrifice of the mortgaged premises. A sale took place, under the decree, at which B. became the purchaser of the farm, at a bid of \$680, S. acquiescing in the sale, under the belief that his interest in the premises was not to be affected by it. B. purchased the property with the intention of holding it merely as security for his advances, and under an agreement with S. that S. should be entitled to the benefit of a resale. B. paid nothing on account of the premises, except the \$430 paid to H.; the balance of the \$680 bid by him, at the sale, remaining unpaid. *Held* that the agreement between the parties, being a parol agreement relating to lands, was void by the statute of frauds. And that B., having obtained the legal title, by the sale under the decree of foreclosure, was under no legal obligation to hold the premises for the benefit of S.; but that he was entitled to claim, as his own, the difference between the amount which he had paid, and the amount received by him for the farm, upon a subsequent sale thereof. *Bander v. Snyder, 63*
14. *Held also*, that if B. elected to avail himself of his legal right to be considered as the purchaser of the mortgaged premises, on his own account, he must be held responsible for at least the amount of the purchase money, viz. the sum bid by him at the sale under the decree of foreclosure. *ib*
15. On the 28th of February, 1842, C. and N. entered into an agreement, under seal, by which C. agreed to sell to N. his farm, for \$6000, \$375 of which was to be paid by the 1st of April, 1843. Of this latter sum, \$200 was to be paid by the 1st day of June, 1842, but if not paid by that time, N. was to give his note for the amount. If C. should receive \$375 from N. and the latter should choose to quit the premises, he was to be at liberty to do so, at the expiration of the year ending on the 1st of April, 1843, by paying said \$375 to C. N. was to have the dwelling house and two barns, with the farm, and the use of two stoves, and to have the stoves if he kept the place. And in case he built a fence he was to be paid for it out of the rent of the place, if he quit the premises. N. also agreed to inform C. by the middle of July, 1842, whether he kept the place according to the agreement, or not. *Held* that the agreement was a contract for the sale and purchase of the premises, and was not a lease thereof, so as to authorize a distress for rent. *Moulton v. Norton, 266*
16. *Held also*, that the provision giving N. the right to quit the premises at the end of the year, upon the payment of the \$375, only amounted to a refusal of the farm to N. for one year, upon a

forfeiture of the first payment ; with a stipulation on his part to give notice, by the middle of July, if he should elect not to keep the premises. *ib*

17. Where a father promised his son that if he would build a house, upon the farm of the former, for two families, and would stay and work such farm during the life of the father, he would devise the farm to the son, by way of compensation for his services ; and the son, relying upon such promise, built a house, and remained on the farm, and worked it, for 22 years, and until his father ejected him therefrom ; but the father refused to make him any compensation, and died without devising the farm to him ; *Held* that an action lay, against the executor of the father, by the son, to recover the value of his services ; and that he was entitled to recover on the common count for work and labor. *Quackenbush v. Eble*, 469

18. *Held also*, that the demand of the son, for compensation, was not due until the death of his father ; and that if he brought his suit within six years from that time it was sufficient. *ib*

19. *Held further*, that the case was not within the statute of frauds. *ib*

20. The general rule is that a party who seeks to recover back money which he has paid under a void or a rescinded contract, must show that he in fact paid money. But an exception has sometimes been allowed, when something else has been received as money. *Per GRIDLEY, J. Moyer v. Shoemaker*, 319

21. It is a universal rule that when a party seeks to recover back money paid upon a contract, on the ground that such contract is void for fraud, or that it has been rescinded, such party must restore, or offer to restore, whatever he has received under the contract ; so as to put the other contracting party *in statu quo*. *ib*

22. And in order to put the parties *in statu quo*, whatever may be valuable to the defendant must be restored to him, though it be of no value to the plaintiff. *ib*

23. Accordingly *held*, that before an action could be sustained, to recover the consideration paid for land, sold to the plaintiff by the defendant and con-

veyed by deed with covenants of warranty, on the ground of a failure of title, the plaintiff must execute to the defendant a reconveyance of the land, or offer to do so. *ib*

24. Where land is purchased by a father, and paid for by him, but the conveyance is made to his son, by the direction of the father, for the purpose of defrauding the creditors of the latter, no trust will result in favor of the father in consequence of his having paid the consideration money ; but as between the father and son and those claiming under the father, such conveyance is absolute, and vests in the son the entire legal and equitable estate. *Proseus v. McIntyre*, 424

25. But the fact that the father, in such a case, paid the whole purchase money of the land, forms a good moral or conscientious consideration for a parol agreement, subsequently made, between the father and the grantee, and another son, for the division of the land between the two sons. And after the two sons have acted under such agreement, for several years, and recognized each other's interests in the respective parcels, and expenditures have been incurred in consequence of such agreement and division, and upon the faith of it, the grantee in the original conveyance will not be allowed to repudiate such agreement, and to claim the whole premises by virtue of his deed. *ib*

See BANKS AND BANKING, 3, 4, 5.
COVENANT, 2.

ASSESSMENT.

The assessment of property is a judicial act, upon which a certiorari will lie. But to make an assessment legal, the assessors must have jurisdiction of the particular case. If they transcend the limits of their authority, and undertake to assess property exempt by statute, they cease to be judges, and are responsible for all the consequences. *Prosser v. Secor*, 607

See CERTIORARI.
MUNICIPAL CORPORATIONS.

ASSESSORS.

1. Assessors have no authority to enter upon the assessment roll the name of

any person whose property is by law exempt from taxation; nor to impose an assessment thereon. They have no jurisdiction whatever over such persons, or their property. Nor can they acquire any by any act, or decision, of their own. *Prosser v. Seacor*, 607

2. Accordingly *held*, that assessors have no jurisdiction over the person or the property of a minister of the gospel not having real and personal estate exceeding the value of \$1500, which will authorize them to impose an assessment upon his property. *ib*
3. In determining whether they have jurisdiction or not, in a given case, assessors do not act judicially. *ib*

ATTACHMENT.

See SHERIFF, 3, 4.

ATTORNEY.

1. The statute prohibiting the purchase of choses in action by attorneys, &c. for the purpose of bringing suits thereon, does not extend to a purchase made at a judicial sale, and under the direction of an officer of the court. *Mann v. Fairchild*, 108
2. But where, in a suit to enforce the collection of a claim against the defendant, he pleaded that at the time of the purchase thereof by the plaintiff, the latter was a practising attorney, &c. and the partner of the plaintiff's solicitor; and that he purchased such claim with the intent, and for the purpose of bringing a suit thereon, contrary to the form of the statute; and the plaintiff took issue upon the plea, and the truth of the plea was established by the defendant; *Held*, that the plaintiff could not maintain his suit, and the bill was dismissed. *ib*

B

BAILMENT.

Receiving goods from another, upon an agreement to sell and account for such goods to the owner, or to return the same, as good as when taken, with

interest, amounts to a *bailment* and not to a *sale*; and the property remains in the bailor. *Morris v. Stone*, 516

BANKRUPT AND BANKRUPT LAW.

1. The claim of a surety against his principal, before payment of the debt by the former, is contingent, and is in terms provided for by the bankrupt act. On payment, by the surety, his claim becomes absolute. It is then a *debt*, and the relation of principal and surety no longer exists. *Crafts v. Mott*, 305
2. Such debt is provable under a commission of bankruptcy against the former principal, and will be barred by his certificate. *ib*
3. Where A. agrees with B. to pay and satisfy a bond and mortgage given by them jointly, payable in instalments at future periods, and to save B. harmless therefrom, the equitable relation between the parties is that of principal and surety. And the claim of B. against A., under the contract to indemnify, is, within the terms as well as the spirit and design, of the bankrupt act, provable against the estate of A., as a contingent claim, to be allowed when it shall become absolute; and will be discharged by A.'s certificate in bankruptcy. *ib*
4. A covenant for quiet enjoyment, contained in a deed, is discharged by a certificate in bankruptcy, where the breach happens after the filing of the petition upon which the certificate is granted. *Jemison v. Blowers*, 686
5. The claim of the grantee, upon such a covenant, before breach, is a "contingent demand" against the grantor, provable under the second clause of the fifth section of the bankrupt act. *ib*

BANKS AND BANKING.

1. Banking associations, organized under the act to authorize the business of banking, passed April 18, 1838, are corporations; and the general laws relating to moneyed corporations apply to associations of that nature. *Leavitt v. Blatchford*, 9

2. Accordingly *held* that the provisions of the revised statutes prohibiting the directors of a moneyed corporation from applying any portion of the funds of their corporation, except surplus profits, to the purchase of shares of its own stock, and declaring that no conveyance, assignment or transfer, nor any payment made, judgment suffered, lien created, or security given by any such corporation when insolvent or in contemplation of insolvency, with the intent to give a preference to any particular creditor, shall be valid, are applicable to associations under the general banking law. *ib*
3. Although the general banking law gives no power to banking associations, in express terms, to borrow money, yet as such an association may become indebted in the exercise of its undoubted legitimate business, it has, as a necessary incident, the power to borrow money for the purpose of paying its debts. *ib*
4. It is a general fundamental principle that when a right is given, all powers necessary to the exercise and enjoyment of the right are also given. *ib*
5. A banking association is liable for the payment of money borrowed for its use, upon a letter of credit signed by the president in pursuance of a resolution passed by the proper committee of the board of directors, although there is no written contract for repayment signed by the president or vice president, and cashier. *ib*
6. Under the provisions of the act of May 14, 1840, declaring that no banking association shall issue or put in circulation, any bill or note of such association, unless the same shall be payable on demand without interest, promissory notes given by a banking association, payable after date, are illegal and void; even though they were not intended to circulate, and are incapable of circulating, as money. *ib*
7. Although notes of a banking association, thus issued, are void, yet the original indebtedness, of which they are the evidences, remains; and a deed assigning property in trust, as collateral security for the payment of the debt, is valid. *ib*
8. Banks formed under the act to authorize the business of banking, passed April 18th, 1838, are not within the provisions of the revised statutes. (1 R. S. 591, §§ 1, 8, 9.) *Gilles v. Moody*, 185
9. Where a bank formed under that act agreed with the defendant, one of its stockholders, that in consideration of his anticipating the payment of his bond and mortgage for \$5000, given to the bank, for his stock, and surrendering his stock to them, they would transfer to him five Arkansas bonds of \$1000 each, which were then worth about 18 cents on the dollar, it was *held* that the agreement was not void; and the same having been executed by the defendant, a bill filed in behalf of the bank, which sought to set it aside, without offering to restore the defendant to the same condition in which he was before the agreement, was dismissed. *ib*
10. Banks formed under the general banking law are corporations. *ib*
-
- BIGAMY.
- See MARRIAGE.
- BILL OF DISCOVERY.
1. A bill of discovery in aid of an action at law must disclose a case which would entitle the plaintiff to recover in such action. And the plaintiff must state and set out so much of the pleadings as will enable the court of equity to see that the facts alleged in the bill, and of which he claims a discovery, are material. *Bailey v. Dean*, 297
2. A bill of discovery, in aid of a suit at law, cannot be sustained if the evidence sought for, when obtained, would be inadmissible upon the trial of the action at law. *ib*
- BILL TO CARRY DECREE INTO EXECUTION.
1. A bill to carry into execution a decree abated by the death of the defendant therein, is a species of *scire facias*; and a court of equity, in such cases, will follow the analogies furnished by the rules of courts of law. Hence if the lands against which the

decree is sought to be enforced were conveyed by the defendant in the decree before the decree was docketed against him, so that it was never a lien upon the lands, the court will not enforce the decree against them. *Tallman v. Varick*, 277

2. But the defendants in such bill are bound to interpose and assert their defence by answer; or they will be forever estopped. *ib*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A draft, or warrant, drawn by the corporation of the city of New-York, upon the treasurer of the city, not in the course of its proper legitimate business, is void in the hands of a bona fide holder, without actual notice of its consideration. *Halstead v. The Mayor, &c. of New-York*, 218
2. The addition of the words "surety" or "security" by the endorers of a note, to their names, does not divest them of their character of endorers. The only effect of the addition of these words, to their signatures, is to give them the privileges of sureties, in addition to their rights as endorers. *Bradford v. Corey*, 461
3. As endorers they cannot be made liable without a demand and notice. And as sureties they are entitled to all the privileges of that character. If they endorse the note severally, they cannot be either joint endorers or co-sureties. *ib*
4. Where a note is endorsed by several persons, severally, the endorers are liable in the order in which their names stand upon the note. *ib*
5. In the case of several endorers, they may be sued jointly, under the statutes of 1832, ch. 276, and of 1837, ch. 93, as different parties to the note—several and not joint endorers—and in such action the plaintiff need not declare specially on the note, although the defendant declared against, endorsed the same as surety for the drawers; but may give the note in evidence under the money counts. *ib*
6. An action cannot be maintained upon a note given by a person to an officer of a benevolent society, for his initia-

tion fee as a member, and for his quarterly dues. *Nash v. Russell*, 556

7. A mere moral obligation, although coupled with an express promise, is not a sufficient consideration to support a note or bill, between the same parties, unless it is founded on a former legal liability. *ib*
8. A note given by a mortgagor, to the holder of the mortgage, as a consideration for the postponement of a sale under a decree of foreclosure obtained thereon, is void, and will not support an agreement by the payee to postpone the sale. *Schroepel v. Shaw*, 580
9. The sufficiency of a notice to an endorser of a note, when there is no dispute about the facts, is a question of law, to be determined by the court. *Dole v. Gold*, 490
10. A notice to an endorser must, in express terms, or by necessary implication, convey to him information of the fact that the note has been dishonored by the maker; or such notice will be insufficient to charge him. *ib*
11. A maker of a negotiable promissory note, payable at large, does not, in this sense, dishonor his note until, upon due presentment for that purpose, he refuses or neglects to pay it. *ib*

See BANKS AND BANKING, 6, 7.

GUARANTY.

MUNICIPAL CORPORATIONS, 4, 5.

NOTICE OF PROTEST.

PAYMENT.

BONA FIDE PURCHASER.

1. In order to defend a title on the ground of a bona fide purchase, it must be shown that the purchase was made for a valuable consideration, and without notice of any prior equity. *Brice v. Brice*, 533
2. When a person, other than the vendor, is in possession of land, the purchaser has constructive notice of the rights of the possessor, and takes the land subject to all his equitable claims. *ib*
3. The possession of such third person is sufficient to put the purchaser up-

on inquiry as to the extent of his rights. And those claiming under the title of such purchaser cannot defend on the ground that he was a bona fide purchaser without notice. *ib*

4. Where certificates of trust, issued by a corporation in pursuance of an arrangement for a loan, by the corporation upon usurious interest, are under seal, the holders or assignees of such certificates take them *cum onere*, chargeable with notice of all the material facts connected with their original concoction and subsequent mutations. *The Farmers' Loan and Trust Co. v. Carroll*, 613

5. As such certificates do not possess the ingredients of commercial paper, that fact is sufficient to put all persons dealing in them upon inquiry, and to deprive the assignees thereof of any protection as innocent or bona fide holders. *ib*

See BILLS OF EXCHANGE, &c. 1.
DEED, 7.

BOND.

See SHERIFF, 1, 2, 3.
SURROGATE, 2, 3.

C

CASE.

The usual allegation, at the end of a case, that the facts therein stated are taken subject to all legal exceptions and objections, and with liberty to turn the case into a bill of exceptions, amounts to nothing more than a statement that the case is made subject to the legal conclusions arising upon the facts contained therein. And it will not authorize a party to object, upon the hearing, to the character of a portion of the evidence, after he has admitted all the facts stated in the case, and consented to the introduction of the evidence, without objection. *Beardslee v. Beardslee*, 324

CASES OVERRULED.

The case of *The Mechanics' Bank v. Edwards*, (1 Barb. Sup. Court Rep, 271,) so far as it decides that usury is

a personal defence, and cannot be set up by a stranger to the original transaction, overruled. *Morris v. Floyd*, 130

CERTIORARI.

1. A certiorari will lie to review the judicial acts of municipal corporations. *The People v. The Mayor, &c. of New-York*, 43
2. Yet where the act complained of is simply ministerial—as the passing of an ordinance by a common council for the construction of a sewer—it cannot be reviewed on certiorari. *ib*
3. But although such ordinance cannot be annulled, on certiorari, it is competent for the supreme court, in a proper case, to vacate the estimate and assessment of the common council in affirming the proceedings for the construction of the sewer; as the common council then acts in a judicial capacity. *ib*
4. And if the estimate and assessment were substantially erroneous, and ought not to have been ratified by the common council, they may be vacated by the supreme court, on certiorari. *ib*
5. A common law certiorari is not a writ of right, but may be granted, or refused, at the discretion of the court. *ib*
6. Before allowing, or acting upon, the writ, the court should be satisfied that it is essential to prevent some substantial injury to the applicant; and that the object aimed at by him would not, if accomplished, be productive of great inconvenience or injustice. It should seldom, if ever, be allowed, to enable a party to take advantage of mere technical objections. *Per STRONG, P. J.*, *ib*
7. The admission, in a justice's court, of incompetent testimony, to establish a fact clearly proved by other testimony, of a competent character, is not such an error as requires the county court, on certiorari, to reverse the judgment of the justice. *Bort v. Smith*, 263
8. Where a justice, in his return to a certiorari, omits to certify that the return contains all the evidence given before him, the court will presume, in

the absence of such certificate, that additional evidence was given, sufficient to support the verdict. *Prosser v. Secor*, 607

See ASSESSMENT.

CHARGE.

1. A devisee of land charged with the payment of debts, by accepting the devise, becomes personally liable to pay the debts charged upon the land. *Elwood v. Deifendorf*, 398
2. The personal liability of the devisee, however, will not exonerate the real estate from the charge. Such charge will continue a lien on the premises not only in the hands of the devisee, but also in the hands of his grantees. *ib*
3. Real estate devised subject to the payment of debts, must be charged in the inverse order of its alienation. *ib*

See DEVISEES.

CONDITIONAL ESTATES.

See DOWER.

CONSIDERATION.

1. Where no consideration is expressed in a deed, or written contract, parol evidence may be given of the actual consideration, in order to give effect to the deed or contract, if such deed or contract is not within the statute of frauds. *Frink v. Green*, 455
2. So where a consideration is expressed in a deed or written contract, another or a different one may be proved. *ib*
3. In an action upon a guaranty expressing no consideration, parol proof of the consideration is admissible, to supply the defect in the written instrument. *Burt v. Horner*, 501
4. A mere moral obligation, although coupled with an express promise, is not a sufficient consideration to support a note or bill, between the same parties, unless it is founded on a former legal liability. *Nash v. Russell*, 556

CONSTITUTIONAL LAW.

1. The 30th section of the judiciary act of May 12, 1847, prescribing in what special cases the respective county courts shall have, original civil jurisdiction, is not unconstitutional. *Beecher v. Allen*, 169
2. Under the 14th section of the 6th article of the constitution, the legislature had the power to determine of what special cases the county courts should have jurisdiction. And it having exercised that power, by giving to those courts jurisdiction over actions of assumpsit, when all the defendants reside in the county where the action is commenced, and the damages claimed do not exceed \$2000, county courts have authority to try actions of that nature. *ib*
3. Courts ought not rashly to presume that the legislature, in enacting a law, has transcended its powers. The presumption is the other way; and the strength of that presumption is increased in proportion to the number of successive legislatures which have coincided in the same measure. *Per WILLARD, J.* *ib*
4. The act of April 7th, 1848, for the more effectual protection of the property of married women, so far as it relates to existing rights of property, in married persons, is unconstitutional and void. *White v. White*, 474
5. The legislature of the state of New-York can lawfully exercise only such powers as have been confided to it by the sovereign will of the people. *Per MASON, J.* *ib*
6. The people have never delegated to the legislature the power to divest the vested rights of property legally acquired by any citizen of the state, and transfer them to another, against the will of the owner. *Per MASON, J.* *ib*

CONSUL.

1. The privilege of a foreign consul to be exempt from the jurisdiction of state tribunals, must be asserted in due time; and may be waived by a plea to the merits. *Flynn v. Sloughlon*, 115
2. After a defendant has pleaded to the merits, and a verdict has been render-

ed against him, he cannot avail himself of his privilege as a foreign consul, by affidavit, upon a special motion. *ib*

CONTRACT.

See AGREEMENT.

CONTRIBUTION.

Where the property of one judgment debtor is taken and sold to satisfy the judgment, such debtor has a remedy against his co-debtors for contribution. *Neilson v. Neilson*, 565

CORPORATIONS.

1. A corporation is liable for an injury done by its servants, if under like circumstances an individual would be responsible. *First Baptist Church in Sch'y v. Sch'y and Troy R. R. Co.* 80

2. Where a corporation relies upon a grant of power from the legislature, for authority to do an act, it is as much restricted to the mode prescribed by the statute, for its exercise, as to the thing allowed to be done. *Per Welles, J. The Farmers' Loan and Trust Co. v. Carroll*, 613

See BANKS AND BANKING, 1, 2, 10.
CERTIORARI, 1.

MUNICIPAL CORPORATIONS.

COUNTY COURTS.

1. A county court has authority, on certiorari to a justice, to look into the testimony, and see if it supports the judgment; and when there is an entire failure of testimony, the court will reverse the judgment. *Bort v. Smith*, 263

2. In this respect it is governed by the same rules which guide the supreme court on an application to set aside a verdict, or a report of referees, upon a case. *ib*

See CONSTITUTIONAL LAW, 1, 2, 3.

COVENANT.

1. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance by the plaintiff. *Grant v. Johnson*, 161

2. The plaintiff, in consideration of \$950, to be paid in instalments, agreed to sell to the defendant a piece of land, and covenanted to give possession on the 1st of November, 1845, and to convey by deed on the 1st of May, 1846, "if the above conditions are complied with;" and the defendant covenanted to pay the \$950 in instalments, payable at different times. The plaintiff gave possession of the premises, and the defendant paid the first instalment according to the terms of the agreement, but failed to pay the second; *Held*, that each party having in part performed the agreement, all the remaining covenants were independent, except that relating to the giving of the deed; and that the plaintiff could maintain an action for the second instalment of the purchase money, without averring that he had given, or tendered, a deed to the defendant. *ib*

3. A covenant not to sue one of the joint obligors or promisors, does not amount to a release, but is a covenant only. It does not, at law, discharge either of the joint obligors or promisors; and a suit may, notwithstanding such covenant, be brought upon the original contract, against all, if it was a joint contract, or the one to whom the covenant was not given, if the contract was joint and several. *Frost v. Green*, 455

See BANKRUPT, &c. 4, 5.

CREDITOR'S BILL.

1. Where a grantor, by a deed of trust, directed the trustees named therein to invest a sum of money, and, after the death of J. to pay the interest thereof quarterly to M. B. and J. B., and to pay the principal sum at the deaths of M. B. and J. B., to their children respectively, and in case either of the *cestuis que trust* should die without

leaving issue, her share to go to the children of the survivor; *Held* that the interest of M. B. in the annuity, after the death of J. and of J. B. without leaving issue, was not liable to the claims of her creditors, and could not be reached by a creditor's bill. *Stewart v. McMartin*, 438

2. Where a trust is created by one person for the benefit of another, and the fund held in trust proceeds from the person making the trust, and the *cestui que trust* has no control over the trust fund, but has only a beneficial interest in the income thereof, which the donor intended should be applicable to her support and maintenance, such trust comes within the terms of the exception in the 38th section of the title of the revised statutes relative to the court of chancery, as well as within its spirit and meaning, although the interest of the *cestui que trust* is not rendered inalienable by the 63d section of the article relative to uses and trusts. *ib*
3. A right of dower, before assignment, is a chose in action, within the meaning of section 39 of the title of the revised statutes relative to the court of chancery, and may be reached by a creditor's bill. *ib*

D

DAMAGES.

See SEDUCTION, 3, 5.

DEBT.

In an action of debt on bond, the plea of *non est factum* only puts in issue the execution of the bond. It admits every other allegation in the declaration. *People v Rowland*, 449

DEBTOR AND CREDITOR.

1. A party bound by either an express or an implied contract, in virtue whereof he may become liable to pay money to another, although his liability may be contingent, is a debtor. *Elwood v. Deifendorf*, 398
2. After the execution of a note by two persons in the characters of principal

and surety, the principal is a debtor to the surety; and although his liability to indemnify the surety is, previous to the payment of the debt by the latter, contingent, it is nevertheless a legal debt, and will be embraced in the terms of a will made by him, charging his real estate with the payment of his "just debts." *ib*

3. An affidavit made by a creditor, or an indifferent person, for the purpose of obtaining a warrant for the arrest of a debtor, under the 3d section of the act to abolish imprisonment for debt, &c. must contain a positive averment as to the truth of the facts and circumstances which are relied upon as the foundation of the warrant. *Mosher v. The People*, 575
4. The facts and circumstances must be of such a character as to tend to prove the ground on which the process is asked for. *ib*
5. The intent of the debtor may be stated on the belief of the creditor, or his agent, when the requisite facts and circumstances are positively proved. *ib*
6. It seems that in forming his judgment that the allegations of the applicant are established, and that the debtor has done, or is about to do, any of the acts specified in the 4th section of the act, some weight is due to the omission of the debtor to answer or explain the facts and circumstances relied upon, if they appear to have been within his personal knowledge. *ib*

See PRINCIPAL AND SURETY.

DECLARATIONS.

See EVIDENCE, 3, 4.

DECREE.

See SURREGATE.

DEED.

1. Where the subscribing witness to a deed or other written instrument is out of the jurisdiction of the court,

- proof of his hand-writing is sufficient evidence of the execution of the deed or instrument, without any proof of the hand-writing of the parties therein named. *People v. Rowland*, 449
2. Information derived from the subscribing witness himself, of his being a resident of another state, is competent and sufficient evidence of his being out of the jurisdiction of the court. *ib*
 3. In all cases there must be a strict, diligent, and honest inquiry made for the subscribing witness, satisfactory to the court, under the circumstances of the case, before proof of his hand-writing will be received. *ib*
 4. The answers given to inquiries respecting the witness' residence may be given in evidence; they being not hearsay, but parts of the *res gestæ*. *ib*
 5. Under what circumstances a deed obtained by a son from his father, by means of an undue influence exerted over the grantor, by the grantee, without the payment of any consideration therefor, will be set aside. *Brice v. Brice*, 533
 6. Where the grantee in a deed thus obtained is both child and confidential agent of the grantor, the case comes within the equitable rule that he who bargains in a matter of advantage, with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence. *ib*
 7. And a person subsequently taking a conveyance of the premises from the grantee in such deed, with notice of all the circumstances under which the deed was obtained, is not in a situation to claim protection as a bona fide purchaser; it being sufficient that he received his conveyance infected with the undue influence and imposition of his grantor. The obligation of restitution follows it into his hands, though he may not be guilty of actual fraud himself. And the general rule that in cases of fraud the whole transaction will be undone, and all the parties replaced in their former situation, will not allow him to avail himself of his own innocence, to protect the property against the person who had been deprived of it by fraud or imposition. *ib*
 8. Where a bill is filed to set aside a conveyance, on the ground of undue influence, if the facts alleged in the bill are sufficient to justify the inference of undue influence, and the proofs sustain the allegations, relief will not be denied because the plaintiff, in stating his case, has averred that the transaction of which he complains occurred through mistake, or misapprehension, or by fraud and deceit. *ib*
 9. L. went to R. B., whose son, J. R. B. was in prison under an indictment for perjury, and informed him that he came at the request of his son, and that W. would unite with him, L., in becoming bail for J. R. B. if R. B. would give L. a warranty deed of his farm; assuring him that the deed was only for the appearance of J. R. B. at court, and would be given up if he stood his trial. R. B. accordingly executed an absolute deed to L., with that understanding. No such deed having, in fact, been required by W., and the pretence of its being necessary, to procure bail for J. R. B. being false; *Held*, on a bill filed by R. B. to set aside such deed on the ground of fraud, that the same was improperly obtained, and should be declared void, as between the grantor and grantee. *ib*
- See* BANKS AND BANKING, 7.
 CONSIDERATION, 1, 2.
 EVIDENCE, 10.
 HUSBAND AND WIFE, 2, 3, 5, 6, 11.
 TRUSTS, &c. 1, 4, 5, 9.
 USURY, 2.
- DEVISEES.
1. An action at law will not lie, in behalf of a creditor, against a devisee of land charged with the payment of debts, unless such devisee has made an express promise to pay the debt, or has paid a part of it, which will be considered as conclusive evidence of an express promise to pay. *Elwood v. Defendorf*, 398
 2. Even where a devisee enters upon the land devised to him charged with the payment of debts, and promises to pay them, a court of law has no jurisdiction of an action against him for the recovery of the debts, unless the land is exclusively charged with their payment. If the personal estate is to be first applied in payment of

the debts, or is to come in aid of the real, the cause belongs exclusively to a court of equity; and a court of common law has no jurisdiction. *ib*

3. A devisee of land charged with the payment of debts, by accepting such a devise, is primarily liable for the payment of the debts, in exoneration of the premises in the hands of his grantees. And the remedy of creditors must first be exhausted against the devisee personally, before their lien can be enforced against portions of the lands subject to the charge, which have been aliened by the devisee. *ib*

DISCOVERY.

1. It is a general rule that a defendant is not bound to discover any thing which might render him liable to a penalty or forfeiture, or to any thing in the nature of a penalty or forfeiture. *Per PRATT, J. Bailey v. Dean,* 297

2. An action for slander, is in the nature of a penal action, and comes within this general rule, *it seems. Per PRATT, J. ib*

DISORDERLY PERSONS.

1. After a person has been convicted, under the acts relative to *disorderly persons*, and committed to prison in default of sureties for good behavior, and a record of conviction has been *made and signed*, (though not filed,) the committing magistrate has no power, acting singly, to discharge the prisoner, or to take a recognizance for his good behavior. *People v. Duffy,* 205
2. The final commitment of the prisoner, after the record of conviction has been made and signed, completely exhausts the power of the magistrate, and ousts him of jurisdiction to take a recognizance. *ib*

DISTRESS.

1. An affidavit of the amount of rent due, annexed to a distress warrant, which purports to give the legal effect of a contract between the parties,

without setting it out in *hæc verba* should, if it is claimed that the contract amounts to a demise, allege that fact. *Moulton v. Norton,* 286

2. It is not sufficient to set out a conditional contract, and an election by the tenant to lease, without alleging any specific demise, or agreement, by which rent was reserved. *ib*
3. The legislature, in making it necessary that distresses should be made by certain public officers, did not intend to change the entire responsibility growing out of those proceedings, and with it the form of pleadings in actions to recover the property, but simply to narrow the circle of selection of the agents to be employed by the landlord. *ib*

4. An officer in justifying the taking of property under a distress warrant, for rent, is obliged to go back of his warrant, and show an actual demise, and rent due. *ib*

See SHERIFF, 8, 9.

DISTRESS WARRANT.

See LIBEL.

DIVORCE.

See MARRIAGE, 1, 2.

DOWER.

1. Where the grantor of an estate on condition enters for condition broken, the dower of the wife of the grantee falls with the estate of her husband. *Beardslee v. Beardslee,* 324
2. Thus where, by the terms of a lease for the life of the grantor, the estate demised was *conditional*, liable to be defeated, and subject to a re-entry, by the non-payment of rent, the condition having been broken, and the lessor having re-entered for that cause; *Held* that the lessor became re-invested with her entire original estate, free from any incumbrance of dower in favor of the widow of the lessee. *ib*

See CREDITOR'S SUIT.

DUE DILIGENCE.

See GUARANTY, 3, 4, 5, 6, 7.

PRINCIPAL AND SURETY, 11, 12.

E

EJECTMENT.

1. In an action of ejectment, brought by a redeeming creditor, after a sale by the sheriff of real property, under an execution, the plaintiff is not bound to prove by extrinsic evidence, that the judgment debtor had no goods or chattels whereof the debt could be made. *Neilson v. Neilson*, 565

2. Proof of the judgment, execution and sale, by the usual documentary evidence, followed up by the deed, is all that is required. *ib*

3. The remedy of the judgment debtor is against the sheriff if he sells real estate before personal property. The disregard by the sheriff of his duty in this respect cannot be used as a defence to an ejectment for the premises sold. *ib*

ENDORSERS.

See BILLS OF EXCHANGE, &c.

EQUITABLE CONVERSION.

1. Persons taking the beneficial ownership of property, under a will, take it in the character which the testator has thought proper to impart to it. If he gives money, to be laid out in land, then it vests as land. If land is devised to be sold, and the proceeds are given over, they become personalty, and vest and pass as such. *Arnold v. Gilbert*, 190

2. The principle on which the doctrine of conversion rests is, that whatever, in a will or other instrument, is directed or agreed to be done is, in equity, considered as already performed. *ib*

3. The general rule is to date the conversion as taking place on the death of the testator; unless there is something special in the power of sale, making its exercise, or performance, depend on the happening of some event or

contingency to arise subsequently, or on the discretion of the executor or trustee to sell, or not. But if the direction is imperative, requiring a sale at all events, and leaving it discretionary only as to the time and manner of selling, then the sale, when made, has the same effect, in respect to the rights of the parties in interest, as though made immediately. *ib*

See WILL, 5.

EQUITY

See DEVISEES.

MERGER.

PARTITION.

WASTE.

ERROR.

1. Where there is a conflict of evidence, upon a trial in a justice's court, the verdict of the jury, so far as questions of fact are concerned, is conclusive, and cannot be reviewed, on writ of error, however much the verdict may be against the weight of evidence. *McDonald v. Edgerton*, 560

2. The admission, in a justice's court, of incompetent testimony, to establish a fact clearly proved by other testimony of a competent character, is not such an error as requires the county court, on certiorari, to reverse the judgment of the justice. *Bort v. Smith*, 283

See TRESPASS.

ESTOPPEL.

Estoppels are not favored in the law. An estoppel *in pais* is never allowed to be used as an instrument of fraud; but is to be resorted to solely as a means to prevent injustice—always as a shield, but never as a sword. *Pierrepoint v. Barnard*, 364

See BILL TO CARRY DECREE INTO EXECUTION.

EVIDENCE.

1. Generally.

1. It is competent to prove the fact that a judgment which had been recovered

- against the plaintiff was entered up on a note received from the defendant, without producing the note. *Artcher v. McDuffie*, 147
2. Evidence that a person who had negotiated the sale of land to a third person, for the owner, by agreement with the latter was to have a certain portion of the proceeds of a bond and mortgage given for the purchase money, is proper in a suit between the parties, and is a good foundation for a subsequent promise by the vendor to pay the amount. *ib*
3. Where a witness, after testifying to a conversation, is asked, on his cross-examination, what reason he had for remembering the conversation, and gives as a reason, a declaration made by one of the parties, at the time, no objection being made to the question by the opposite party, the counsel asking the question cannot repudiate the testimony after the witness has answered the question. *ib*
4. It is not competent for a defendant to prove his own declarations made when the plaintiff was not present, although they were made to a third person in a conversation which took place by the plaintiff's request. *ib*
5. Evidence as to the object for which a release was executed cannot be admitted for the purpose of attempting to change the legal effect of the release: but it is proper to prove that it was executed to a witness on the trial of a cause, with the view of showing at what time it was given, and that it was not the consideration of the assignment in question, so as to take it out of the statute of frauds. *ib*
6. A party who objects to evidence, or to the competency of witnesses, should state specifically the grounds of his objection. It is not sufficient to object, generally, that the evidence is illegal, or the witness is incompetent; but the party objecting must put his finger on the very point, to apprise the court and his adversary of the precise objection he intends to make. *Elwood v. Deifendorf*, 398
7. The protest and certificate of a deceased notary public are presumptive evidence of the presentment of a note, and of non-payment and notice to the endorser; notwithstanding the endorser, when sued upon the note serves an affidavit with his answer, denying that he ever received notice of non-payment. *McKnight v. Lewis*, 681
8. The certificate of an officer, when by law evidence for others, is competent testimony for the officer himself, provided he was, at the time of making it, competent to act officially in the matter to which it relates. *ib*
9. Accordingly, where a notary public protested a note, in which he was not interested at the time, but he afterwards became the holder thereof, *held*, that in a suit upon such note by his personal representative, after his death, the protest and certificate of the notary were competent evidence in behalf of the plaintiff. *ib*
2. *Parol, when admissible.*
10. Where the justice of the case imperiously demands it, parol evidence may be received, to show the intention of the parties to a deed; and then effect may be given to such intention, as an implied trust. *Hosford v. Merwin*, 51
11. After evidence has been given by the plaintiff, in regard to a mortgage, without objection, and several inquiries in regard to its contents have been made by the defendant, both parties will be considered as having acquiesced in receiving parol evidence of the mortgage; and the defendant cannot then object to the plaintiff's proving at what time the mortgage fell due. *Morss v. Stone*, 516
- See CONSIDERATION, 1, 2, 3.

EXECUTION.

1. One defendant in a judgment may become the purchaser, at a sheriff's sale, of the real estate of his co-defendant. *Neilson v. Neilson*, 565
2. It seems the purchaser is not affected by the sheriff's return of the writ, or his failure to return it. *ib*
3. If a judgment is satisfied before sale, even a bona fide purchaser derives no title from the sale. *ib*

4. The sheriff may sell under an execution against several defendants who are tenants in common of the premises bound by the judgment, the right and title of all the defendants together; unless some one claiming to be the owner of some portion of the estate, or claiming to be entitled by law to redeem any portion, shall require such portion to be exposed for sale separately; in which latter case it must be sold separately. *ib*

5. Where the sheriff sells the right and title of several defendants to certain premises, and a mortgage creditor of one of the defendants redeems the right and title of such defendant, the deed of the sheriff to such redeeming creditor conveys only the right and title of the defendant which is thus redeemed. *ib*

See SHERIFF.

EXECUTORS AND ADMINISTRATORS.

1. It is no objection to a recovery upon the bond of an executor or administrator that the decree of the surrogate, for the non-performance of which such bond was ordered to be prosecuted, does not state the names of the general guardians of the infant children to whom the money is to be paid. *People v. Rowland*, 449

2. The admissions of an executor or administrator cannot be received in evidence, either as against his co-executors or co-administrators, or as against heirs and devisees. *Elwood v. Deffendorf*, 398

See SURROGATE.

F

FORFEITURE.

1. A forfeiture incurred by a tenant, in cutting and removing wood and timber, will be waived by the landlord's subsequently receiving rent from him. *Per HARRIS, P. J. Camp v. Pulver*, 91

2. The receiving of rent, by a lessor, after the commission of acts by the les-

see entitling the lessor to declare the lease forfeited, if the rent was accepted with a knowledge of those acts, amounts to a waiver of the forfeiture. *Clarke v. Cummings*, 339

FORMER SUIT.

A former suit between the same parties is no bar to a second action for the same demand, where the validity of the plaintiff's claim was not passed upon in the former suit; the referees in that suit reporting against the plaintiff expressly upon the ground that his action was prematurely brought. *Quackenbush v. Eble*, 469

FRAUD.

See VENDOR AND PURCHASER, 1, 4, 7.

FRAUDS, STATUTE OF.

See AGREEMENT, 17, 18, 19.

G

GROWING TREES.

Growing trees are real estate, and cannot pass, except by an instrument in writing. *Pierrepont v. Barnard*, 364

GUARANTY.

1. The undertaking of the guarantor of a promissory note is not within the statute of frauds; and if made upon a good consideration, is valid, although no consideration be expressed. *Burt v. Horner*, 501

2. The legal effect of a guaranty in these words, endorsed on a promissory note, "We guaranty the collection of the within note," is the same as if it had been said, "We guaranty the collection of the within note by due course of law." *ib*

3. The obligation assumed by the holder, in accepting a note with such a guaranty endorsed upon it, is that in case

- the note is not paid at maturity, he will, within a reasonable time, and with due diligence, institute legal proceedings against the maker, for the collection of the note, and prosecute them to consummation, without delay. *ib*
4. This is a condition precedent to the liability of the guarantor, and imposes upon the guarantee the duty of diligence not only in the manner of conducting the prosecution, but also in the institution thereof. *ib*
5. Where there is no dispute about the situation and circumstances of the parties, and no question as to the steps which have been taken or omitted by the guarantee, against the principal debtor, the question of due diligence is a question of law. *ib*
6. An omission to sue the maker of a note, for seventeen months after its maturity, is such laches on the part of the holder as will discharge the guarantor. *ib*
7. And a neglect to sue the maker will not be excused by the fact that he has no property within this state. If he resides out of the state, at the time of giving the note, and continues to reside there, and has property at the place of his residence, it is the duty of the holder to prosecute him there, before he can have recourse to the guarantor. *ib*

H

HAND-WRITING.

See DEED, 1.

HUSBAND AND WIFE.

1. In an action by husband and wife, brought to recover damages for an injury to the person of the wife, the defendant is at liberty to prove that the act complained of was done by the consent and request of the wife; and if such facts are proved, they will constitute an entire defence. *Pillow v. Bushnell*, 156
2. A husband, by a post-nuptial settlement, made on the 29th of June, 1833, reciting that he had, by means of his marriage, acquired certain interests

and rights in his wife's property, released and conveyed all the estate, both real and personal, and all his right, title and interest in such property to trustees, in trust to hold and keep both the principal and interest thereof during marriage, exempt from his debts, contracts, or control, to be managed and disposed of on his wife's separate orders or receipts, or by her deeds or will, so that she might enjoy and dispose of the same in all respects as if she were unmarried. *Held* that by this conveyance the husband's right to the personal estate, and the possession and the income of the real estate, passed to the trustees. That the husband could not convey, in that manner, the right to dispose of the fee in the real estate at any time, nor of the rents and profits after his decease; and that those rights were unaffected by the deed of settlement, and remained the same as if no such instrument had been made. *Cruger v. Cruger*, 226

3. *Held also*, that the wife's interest in her personal property was neither "future nor contingent." That she had the absolute right of disposal of both principal and interest; and that there being nothing in the deed of settlement providing for the accumulation of the income, or suspending the absolute ownership beyond the period of two lives in being, it did not militate against any provision of the revised statutes, and was valid by the rules of the common law. *ib*
4. *Held further*, that the absolute right of disposal, as to such personal property, gave to the wife the power to convey the principal, or the income only, or any part of either. *ib*
5. And the wife having, in pursuance of the power of appointment contained in such deed of settlement, by deed dated November 19, 1841, conveyed to her husband, for life, the one equal half part of the net income of her separate fortune and estate, both real and personal; *Held* that such deed did not confer upon the husband any right to receive any part of the future rents and profits of her real estate; but that so far as such deed related to the income of the personal estate, it was authorized by the terms of the post-nuptial settlement. *ib*
6. *Held also*, that such deed from the wife to her husband was not a con-

veyance of the half of two distinct subjects, but that it conveyed the half of the whole income, as one subject matter; and that if the wife had power to convey so much of her income, from whatever source derived, the instrument would operate upon that part of it; especially as that construction would be the best effectuate the intention of the parties, at the time when the transaction took place. And that such deed, if free from other objections, must be adjudged to convey to the husband the income arising from the personal estate, to the extent of one half of the net income of her whole estate, real and personal. *ib*

7. A feme covert, having a separate estate, subject to her own disposal, may give it to her husband, as well as to any other person, if her disposition of it be free, and not the result of flattery, or force, or improper treatment. *ib*
8. It is not wrong for the husband to endeavor, by his own reasoning, and the persuasion of his wife's friends, to prevail upon her to make a reasonable disposition of a part of the income of her separate estate for his benefit. *ib*
9. It is not necessary that the act of the wife should be spontaneous, or that she should adopt the instrument executed by her, through the unaided impulses of her own mind. *ib*
10. Although a wife, in making a disposition of a part of her income for the benefit of her husband, acts in opposition to sentiments which she has long cherished, yet such disposition will be free, within the principle, if she eventually executes the deed through the deliberate convictions of her own mind; whether produced by her own reflections, or the suggestions and advice of her friends. *ib*
11. Where a deed, executed by a married woman in favor of her husband, was reasonable in its terms; was the result of an arrangement made through the advice of the wife's nearest relatives and friends; was drawn by her counsel; was executed in pursuance of what appeared to be her convictions of right, at the time; and was acknowledged by her to be her free act and deed, done without any fear or compulsion of her husband; and there was no fraud or imposition practised upon her, the court refused to set the

same aside, upon a bill filed by her for that purpose. *ib*

See CONSTITUTIONAL LAW, 4, 5, 6.
MARRIAGE.
PARENT AND CHILD.
WITNESS, 1, 2.

I

INDICTMENT.

See INTENT.

INNKEEPER.

1. Purchasing liquor, at an inn, is sufficient to constitute the purchaser a guest. *McDonald v. Edgerton*, 560
2. If a person, after becoming a guest at an inn, goes away for a brief period, leaving his property, intending to return, he is to be considered as still continuing a guest; and if his property is lost during his absence, the innkeeper is liable. *ib*
3. It is not necessary that goods should be placed in the special keeping of an innkeeper in order to make him liable in case of loss. If the owner is a guest, and his goods are within the inn, that is sufficient to charge the innkeeper. *ib*

INTENT.

1. On the trial of an indictment for a misdemeanor, in exposing the bodies of the defendants, naked and uncovered, to the public view, the *intent* with which the act was done is a material ingredient in the offence, and is a question of fact, for the consideration of the jury, under all the circumstances of the case. *Miller v. The People*, 903
2. It is for the jury to find whether there has been an intentional, wanton and indecent exposure of the persons of the defendants, at such a time and place, and in such a manner, as to offend against public decency. And a charge which withdraws that question from the consideration of the jury, as a question of fact, is erroneous. *ib*

INTENTION.

See EVIDENCE, 10.
MERGER.

J

JUDGE'S CHARGE.

See INTENT.
REPLEVIN.

JUDGMENT.

1. If a mortgagor, on being sued at law upon the bond given in connection with the mortgage, interposes a defence, but fails to appear at the trial, and a judgment is recovered against him for the penalty of the bond, that judgment is conclusive upon him, and establishes the validity not only of the bond but of the mortgage given to secure the bond debt. And in a suit to foreclose the mortgage the mortgagor cannot set up the defence attempted to be made in the suit at law upon the bond. *Morris v. Floyd*, 130
2. In a suit before a justice of the peace, where the facts which the evidence upon one side tends to establish would entitle the party to a judgment, if found in his favor, the judgment is conclusive, however clearly the jury may have found against the weight of the evidence. *McDonald v. Edger-ton*, 560
3. If a judgment is *satisfied* before a sale of the defendant's property under an execution, even a bona fide purchaser derives no title from the sale. *Neilson v. Neilson*, 565

See SET-OFF.

JUDICIARY ACT.

See CONSTITUTIONAL LAW, 1.

JURISDICTION.

1. The supreme court will not entertain jurisdiction of a complaint alleging that the plaintiffs are the owners of certain property, on which the defen-

dants claim to have a lien for *salvage*; asking the aid of the court to determine whether such lien exists, and if so, to ascertain its extent, in order that the plaintiffs may redeem; and praying for the appointment of a receiver *pendente lite*. *Frith v. Cro-well*, 209

2. The court of admiralty is the proper tribunal for that purpose. *ib*
3. No officer can acquire jurisdiction by deciding that he has it. In all such cases every officer, whether judicial or ministerial, decides at his peril. *Per JOHNSON, P. J. Prosser v. Secor*, 607

See DISORDERLY PERSONS.
WASTE.

JUSTICE'S COURT.

Where a plaintiff, in an action in a justice's court, claimed, in his declaration, damages to the amount of "one hundred dollars and over," but took judgment for less than \$100; *Held*, that there was no error: the words "and over" being void for uncertainty. *Rockwell v. Perine*, 573

See CERTIORARI, 7, 8.
ERROR, 1, 2.

L

LACHES.

See GUARANTY, 6, 7.

LANDLORD AND TENANT.

1. Where a demised building is destroyed by fire, between the execution of the lease and the commencement of the term, and before the lessee has taken possession of the premises, he is not liable to pay rent. *Wood v. Hubbell*, 601
2. The surrender of the possession, by the lessor, to the lessee, is a condition precedent to the right of the former to demand, or the obligation of the latter to pay, rent. *ib*

3. And the rule is the same whether the lessor *refuses* or is *unable*, to give possession. *ib*

See FORFEITURE.
LEASE.

LARCENY.

See WARRANT, 1.

LEASE.

1. What is a reasonable search and inquiry for the persons upon whose lives the continuance of the estate of a lessee is made, by the terms of the lease, to depend, is a mixed question of law and fact, to be determined upon the particular circumstances of each case. *Clarke v. Cummings*, 339
2. The circumstances *may* be such as to render an inquiry of the tenant, only, a reasonable inquiry and search, *it seems*. *ib*
3. The conditions of a lease do not become severed, by a severance in the occupation of the demised premises, and in the payment of rent to the lessor by the respective occupants, for the portion occupied by each. *ib*
4. Hence if either a lessee, or an assignee of the lease as to a portion of the demised premises, commits any act which, by the terms of the lease, creates a forfeiture of the estate, the forfeiture attaches to the whole of the premises embraced in the lease. *ib*
5. Where a lease contained a covenant, on the part of the lessee, that he would not cut or destroy any part of the timber and wood growing on the demised premises, except for making or repairing buildings to be erected on the land, and for necessary fencing, and fuel for one dwelling house, with a clause of re-entry by the lessor, for a breach of any of the covenants by the lessee; and it was proved in an action of ejectment brought by the lessor against the lessee, that the latter had cut timber and trees for purposes not authorized by the lease; *Held* that the lessee could not escape the consequences of the forfeiture incurred by such act, on the ground that he had procured his fire wood and fencing timber from other land, and that he had not withdrawn from the demised premises more wood than the lease authorized him to take, although he had used it for other purposes. *ib*
6. In such a case the fire wood of the tenant should be *reasonable estovers*. *ib*
7. Where a lessee covenants that he will not use any of the wood or timber growing on the demised premises, except for certain objects specified in the lease, if he uses wood or timber for other purposes, and such wood or timber is not suitable for the object specified, he commits a wrong against the lessor, and diminishes the value of his reversionary interest in the premises. *Per GRIDLEY, J.* *ib*
8. A lessee, authorized by the lease to cut wood for fuel or fencing, must comply substantially with the conditions of the lease. He cannot omit, for years, to take fire wood and fencing timber from the premises, suffering the wood proper for those uses to be destroyed and wasted, and then, by way of compensation or indemnity, enter upon the premises and take timber and wood to which the lease gives him no right. *Per GRIDLEY, J.* *ib*
9. Until the term commences and possession is given of the demised premises, a lease is an executory contract on the part of the lessor, for a breach of which he may be prosecuted, in the same manner as upon any other executory contract. And it is the same on the part of the lessee. *Per JOHNSON, P. J. Wood v. Hubbell*, 601
10. Previous to the commencement of the term, the rights of the parties to a lease rest in mere contract. *Per JOHNSON, P. J.* *ib*
11. Where a lease contains a covenant on the part of the lessee to surrender up the possession of the premises, at the expiration of the lease, in the same condition they are in at the date of the lease, natural wear and tear excepted, but there is no covenant to repair or rebuild; and the buildings are destroyed by fire during the continuance of the term, the tenants are not bound to put up new buildings

in the place of those destroyed. *Warner v. Hitchens*, 666

12. But where fixtures attached to, and constituting a part of the demised premises, are severed by the fire, and are subsequently carried away by the lessees and not returned, they do not thereby lose their identity, but are fairly within the agreement to surrender at the end of the term; and the lessor may recover their value, in an action upon the lease. *ib*

LEGITIMACY.

See MARRIAGE, 3, 4.

LEX LOCI,

See ADMINISTRATION.
AGREEMENT, 5, 6, 7, 11.

LIBEL.

1. No proceeding according to the regular course of justice will make a complaint, or other act, amount to a libel, for which an action can be maintained. *Bailey v. Dean*, 297
2. A distress warrant is a remedy given to the party by law, for the purpose of enforcing a legal right, and comes within the reason of this rule. *ib*

LIMITATION OF ESTATES.

See WILL, 1, 9, 10, 11, 15.

LIMITATIONS, STATUTE OF.

1. No exception to the statute of limitations can be claimed, unless it is expressly mentioned in the statute. *Bucklin v. Ford*, 393
2. The statute of limitations begins to operate only from the time a right to demand the thing in question vests in some one. A cause of action cannot be said to "accrue" within the terms of the statute, until there is some person in existence capable of suing, or at least some person to whom, or against whom, it may accrue. *ib*

3. Accordingly, where A. received property belonging to B., after B.'s death, and C. took out letters of administration, and brought his action against the executor of A., who pleaded the statute of limitations; *Held* that the statute only commenced running from the granting of letters of administration, and not from the receipt of the property; and that it was sufficient if the action was brought within six years after the granting of letters of administration. *ib*

4. In cases where a court of equity has exclusive jurisdiction, the only limitation applicable to the demand is the ten years' limitation of suits in equity. *Elwood v. Deifendorf*, 369

LOAN.

Under what circumstances a transaction really amounting, in legal effect, to a loan of money by one party and the pledging of real estate by the other, as security for its repayment, will be considered and treated as a loan, although disguised by the parties under the name and form of a trust of real estate. *The Farmers' Loan and Trust Co. v. Carroll*, 613

LUNATIC ASYLUM.

Under the provisions of the act to organize the state lunatic asylum, &c. passed April 7, 1842, a judge has no power to grant an order directing a sheriff to discharge a prisoner from imprisonment, on the ground of his being insane. He can only direct such prisoner to be sent to the lunatic asylum. *Busk v. Pettibone*, 273

M

MALICIOUS PROSECUTION.

To sustain an action for slander of title, or for malicious prosecution, there must be a want of probable cause. If what the defendant says, or does, is in pursuance of a claim of title, he is not responsible. *Bailey v. Dean*, 297

MARRIAGE.

1. After the dissolution of a marriage, for adultery, the marriage contract is at an end, and the relation of husband and wife no longer exists between the parties; and if the guilty party marries again, he is not within the penalty of the act against bigamy. *People v. Hovey*, 117

2. But the second marriage being absolutely prohibited by the 47th section of the act concerning divorce, is punishable as a misdemeanor, under the 45th section of the title of the revised statutes, relative to misdemeanors. *ib*

3. Upon an issue as to the legitimacy of a child, it is not necessary to prove the actual marriage of the parents; but a marriage may be proved by evidence of cohabitation, reputation, and the acknowledgment of the parties. *Clayton v. Wardell*, 214

4. But when there is evidence of an actual marriage, and the issue is as to the legitimacy of a child of such marriage, the marriage will not be rendered illegal, nor the issue of it declared illegitimate, by proof of a prior marriage, arising from cohabitation, reputation, and the acknowledgment of the parties. *ib*

See CONSTITUTIONAL LAW, 4, 5.

MERGER.

In equity the *intention* constitutes the governing principle in relation to the doctrine of merger. *Hosford v. Merwin*, 51

See TRUSTS AND TRUSTEES, 4.

MINISTER OF THE GOSPEL.

In order to enable a minister of the gospel to maintain an action against assessors, for assessing his property and thereby subjecting him to the payment of taxes, he must show affirmatively,

1. That he is a minister of the gospel, or priest of some denomination, and
2. That the value of both his real and personal property does not exceed \$1500. *Frosser v. Secor*, 607

See ASSESSORS.

MISDEMEANOR.

See INTENT.

MARRIAGE, 2.

MONEY HAD AND RECEIVED.

1. Under a count for money had and received a party cannot recover from another a sum of money which it was his duty to collect, but which he had failed to collect, by reason of an error in computation made by his attorney. *Artcher v. McDuffie*, 147
2. It is a general rule that the action for money had and received will only lie where money, or its equivalent, has been received by the defendant. *ib*

MONEY PAID.

See VENDOR AND PURCHASER, 1, 2, 4, 5-WARRANTY, 1.

MORTGAGE.

Although conveyances of land, executed by a borrower to the lender, upon the making of a loan, are absolute in terms, and assume to convey the entire fee, yet if it appears by agreements executed by the parties at the same time that they were intended only as securities in the nature of mortgages for the repayment of the loan, they will be considered as mortgages. *The Farmers' Loan and Trust Co. v. Carroll*, 613

See JUDGMENT, 1.
PRESUMPTION.

MUNICIPAL CORPORATIONS.

1. A corporation, after having appointed commissioners of estimate and assessment, has the right to remove them, and appoint others in their place. *People v. The Mayor, &c. of New-York*, 43
2. An estimate of the expense of constructing a sewer, in a city, ought to be made before a contract for the work is executed, or operations are commenced. And a contract executed previous to the making of the estimate is invalid, and creates no charge

against the owners of the lots assessed, nor incumbrance upon their property. *ib*

3. Yet the premature execution of a contract for the work will not affect the validity of the original ordinance for the construction of a sewer, nor of a subsequent estimate or assessment properly made. *ib*

4. The corporation of the city of New-York has no general power, express or implied, to issue negotiable paper. It has only a special and conditional implied power for that purpose, i. e. it is necessary as a condition precedent to the validity of such paper that the debt which forms its consideration should be contracted in the course of the proper legitimate business of the corporation. *Halstead v. The Mayor, &c. of New-York*, 218

5. The charter of the city of New-York being a public act, every person who takes the negotiable paper of the corporation is bound to know the extent of its powers; and is presumed to receive it with a full knowledge that such corporation has only a limited and conditional power to issue it. He is thus put upon inquiry, and takes it at his peril. *Per EDWARDS, J.* *ib*

6. As a general rule, the power of the corporation of New-York to institute and defend suits, can only be exercised in cases where the corporation is a party to the suit. But there are some exceptions, in cases where the corporation, though not a nominal party to the record, is the real party in interest. *Per EDWARDS, J.* *ib*

See CERTIORARI, 1, 2, 3, 4.

N

NEW TRIAL.

1. The court will not determine the question whether a new trial should be granted, on the ground that the testimony of an interested witness has been received, when, under the existing law, no objection would lie to the competency of the same witness upon a new trial. *Camp v. Pulver*, 91
2. Where evidence is introduced on a hearing before referees, upon a ques-

tion of fact, and the referees come to a conclusion thereon, a new trial will not be granted on account of the incorrectness of their conclusion; whatever may be the opinion of the court upon that point. *Spencer v. The Utica and Schenectady Rail-Road Co.*, 337

NORTH AMERICAN TRUST AND BANKING COMPANY.

Under the articles of association and by-laws of the North American Trust and Banking Company the committee of the board of directors, on investments and finance, had the power to authorize the execution of an agreement and trust deed, by the president and cashier of the company, to secure the repayment of a loan made to the company. *Leavitt v. Blatchford*, 9

NOTICE.

See BILLS OF EXCHANGE, &c. 3, 9, 10.

NOTICE OF PROTEST.

Where a notice of the protest and non-payment of a note is in form good, and has upon its face all the requisites of a legal notice, but *misdescribes* the note, the question to be determined is not one of law as to the sufficiency of the notice, but is a question of fact, whether the endorser was misled by the mistake. *McKnight v. Lewis*, 681

NUISANCE.

1. The writ of nuisance must be brought against the party by whom the nuisance was erected; and if he has transferred the land to another, then he by whom the nuisance was erected and he to whom it was transferred, must both be named as defendants in the writ. *Brown v. Woodworth*, 550
2. An action of nuisance against the alienee of land, alone, for *keeping up and continuing* a nuisance erected by his grantor, was unknown to the common law, and is not authorized by the revised statutes. *ib*
3. Where the count, in an action of nuisance, alleged that the nuisance was

below the plaintiff's land, and the proof was that it was *adjoining* and on the plaintiff's land; *Held* that the variance was fatal. *ib*

See RAIL-ROADS, 1, 2, 3.

P

PARENT AND CHILD.

1. A person is not bound to maintain the child of his wife, by a former husband; nor is he entitled, by law, to claim the services of such child, unless the latter chooses to render them. *Williams v. Hutchinson*, 129
2. But if an individual does in fact support and maintain his step-child in his family, and treats him as a member of it—standing *in loco parentis* to him—under such circumstances the law will not imply a promise to pay for services rendered by the step-child, nor permit a recovery therefor, unless an express promise is shown, or something to prove that such was the expectation, on both sides. *WELLES, J. dissenting.* *ib*
3. The fact of the step-father's standing *in loco parentis* effectually repels all presumption of service for hire or wages, and renders an express promise indispensable to the maintenance of an action by the step-child. *WELLES, J. dissenting.* *ib*

See ADVANCEMENT.
SEDUCTION, 1, 2.

PAROL LICENSE.

1. An agreement for the sale and purchase of land contained a covenant on the part of the purchasers that they would not cut, or suffer to be cut, for sale, any timber from the land, without the consent or approbation of the vendor first had and obtained, *in writing*. In an action of trover, by the vendor, against a person claiming under the purchasers, for a conversion of lumber made from timber growing upon the land sold; *Held* that the defendant could not be permitted to give evidence of a *parol license* from the vendor to the purchaser to cut timber upon the premises. *Pierrepoint v. Barnard*, 364

2. A *parol contract* for the sale of growing trees is void, by the statute of frauds, and conveys no title to the purchaser. And so, *a fortiori*, of a *parol license*, without consideration, to cut growing trees. *ib*

3. Where a license is given, by the owner of land, to another, to cut a limited quantity of timber upon the land, the cutting of any more than the quantity specified is a fraud upon the owner; and he is entitled to recover the value of the overplus, in an action of trover against the person cutting the timber, or one deriving title to the same under a judgment against such person. *ib*
4. A *parol license* to do an act upon the land of another, which act may affect the owner in the exclusive use of his land, is creating an interest in the land, and is therefore within the statute of frauds, and void. *Houghtaling v. Houghtaling*, 379
5. A *license*, by the owner of land, to erect a dam which shall flow it, cannot be created and annexed to an estate of inheritance, or freehold, so as to bind a subsequent owner, without deed. *Brown v. Woodworth*, 550
6. The interest created by such a license is a freehold interest by way of easement, in the land flowed; which can only pass by deed. *ib*

PARTITION.

1. The fact that a defendant is in possession of premises, claiming to hold them adversely to the plaintiff, is, in general, a sufficient ground for denying a partition, in a court of equity. But when the question arises upon an equitable title set up by either of the parties, the reason of the rule fails. *Hosford v. Mervin*, 51
2. A court of equity will not entertain a bill for a partition when the legal title is disputed or doubtful; because a court of law is the proper tribunal to determine such questions. But when the questions are such as belong to a court of equity, it will not suspend the proceedings without doing complete justice between the parties. *ib*

See TRUSTS AND TRUSTEES, 2.

PAYMENT.

1. The taking of a note, either of a debtor or of a third person, for a precedent debt, is no payment, unless it be expressly agreed to take the note as payment and to run the risk of its being paid; or unless the creditor parts with the note, or is guilty of laches in not presenting it for payment. *Elwood v. Deifendorf*, 398
2. And it seems that a promissory note of the debtor, or of one of two or more joint debtors, given for a precedent debt, is not a satisfaction of such precedent debt, even although the creditor expressly accepts the note in satisfaction. *ib*
3. A negotiable note may operate *sub modo*, to satisfy a debt; as for the purpose of enabling a surety to bring an action for money paid, against the principal. *ib*

See PRESUMPTION.

PLEA OF TITLE.

In a cause commenced in a justice's court, and removed to the common pleas, by plea of title to land, the plaintiff's proof must be confined to his declaration. *Houghtaling v. Houghtaling*, 379

PLEADING.

1. A pleading which sets up two good defences and is therefore double, and which omits to state the time and place when and where the several acts set up in the pleading took place, is bad on demurrer. *Barnes v. Matteson*, 375
2. Where a plaintiff replies to a plea, he admits its sufficiency; and if the truth of the plea is established the bill will be dismissed. *Mann v. Fairchild*, 108
3. To a declaration in assumpsit the defendant pleaded that under proceedings in bankruptcy, instituted by the plaintiff, a decree had been obtained by which all the plaintiff's property, including the promise in the declaration mentioned, was vested in T. B., the assignee appointed by the court.

The plaintiff replied that after the said decree, T. B., the assignee, for a valuable consideration, paid to him by the plaintiff, duly sold, transferred, and assigned to the plaintiff all the right, title, and interest of the assignee to the promises, &c. in the declaration mentioned; *Held* that the replication was not bad, for want of an averment that the sale and transfer by the assignee to the plaintiff were made in pursuance of an order of the court; and that a general averment of the sale and transfer was good on general demurrer. *Barnes v. Matteson*, 375

POSSESSION.

See BONA FIDE PURCHASER.

POWERS.

1. A general power in trust, the execution or non-execution of which does not depend on the mere volition of the trustees, is imperative in its nature, and imposes a duty, the performance of which may be compelled in equity. *Arnold v. Gilbert*, 190
2. Where the execution of a general power in trust to sell real estate, unlimited as to time, is not made to depend on the happening of any event which might possibly carry it beyond the duration of two lives in being, the validity of such power cannot be objected to on the ground that it unduly suspends the alienability, or absolute ownership of the property. *ib*
3. Distinction between an estate in trust and a power in trust. *The Farmers' Loan and Trust Co. v. Carroll*, 613
4. There can be no power in trust independent of the idea of a trust; i. e. there can be no power in trust without an appointee or beneficiary, other than the donee of the power. *ib*

PRESUMPTION.

Where fourteen years have been suffered to elapse between the time when the last payment upon a bond and mortgage became due, and the commencement of a suit to foreclose the mort-

gage, that fact, in connection with other circumstances tending to prove payment, will be sufficient to warrant the presumption that the bond and mortgage have been paid. *Bander v. Snyder*, 63

See CONSTITUTIONAL LAW.

PRINCIPAL AND SURETY.

1. As a general rule, sureties are entitled to the benefit of all securities which may have been taken by any one of them to indemnify himself against their joint liabilities for their principal. The security taken by one of the sureties enures to the benefit of all. *Elwood v. Deifendorfs*, 398
2. The taking a new security, payable at a future day, from the principal debtor, for an old debt past due, without an agreement to extend the time of payment, does not discharge the surety. *ib*
3. To discharge a surety, by giving time to the principal debtor, not only the fact of suretiship must exist, but it must be known to the creditor at the time of doing the act complained of. *ib*
4. A surety has no cause of action against the principal debtor until he has actually paid the debt. *ib*
5. His remedy, on payment of the debt, is not on the original security, but is by an action for money paid for his principal. The original debt is extinguished by the payment. *ib*
6. But if the surety gives his negotiable note for the debt, and it is received expressly in satisfaction of the debt, this is regarded as equivalent to the payment of money, and an action may be immediately brought by the surety, although the note remains unpaid. *ib*
7. Sureties of a surety, and assignees of a surety, are entitled to all the rights of the latter, and to be substituted in his place, as to all his remedies against the principal debtor, or his estate. *ib*
8. One of the rights of a surety is to charge his principal with the costs of a suit for the collection of the debt, which he has been compelled to pay. *ib*
9. H. & C., after having recovered a judgment against E., the principal debtor, assigned the same to M., together with the execution issued thereon, and all moneys due on the same, and the property already sold upon the execution and bid in by H. & C., giving M. the right at all times to control the execution; but reserving to the assignors the right to enforce a judgment obtained by them against C., the surety of E. for a part of the same debt. At the same time H. & C. gave to E. a receipt, in which they promised and agreed not to enforce any claim under or by virtue of their judgment against him, or on the note upon which that judgment was obtained; *Held*, that H. & C. had by the arrangement made with M. & E. in effect released E. from all further obligation to pay that part of their debt for which C. was liable as surety; and that having disabled themselves from collecting their debt of E., the principal debtor, or from transferring the right to enforce collection to C., the surety, upon his paying the debt, they had exonerated C. also. *PARKER, J. dissenting. Hubbell v. Carpenter*, 520
10. In equity, an endorser does not lose his character of surety by the recovery of a judgment against him upon the original security. *ib*
11. Although there is no duty of active diligence imposed upon a creditor for the protection of a surety, yet on the other hand, if by his own active interference the creditor suspends his own right, and consequently the right of the surety, if he shall claim his privilege of substitution, to proceed for the collection of the debt against the principal debtor; or if the creditor relinquishes any security he may hold for his debt, or surrender any funds he may hold applicable to its payment, he, to that extent at least, exonerates the surety. *Per HARRIS, P. J. ib*
12. The proper inquiry, in every case, is not what degree of diligence the creditor has exercised in the collection of the debt; nor with what degree of negligence he is chargeable, but whether he has, *by his direct acts*, injured the surety. *Per HARRIS, P. J. ib*
13. A dealing, by a creditor, with the principal debtor, in respect to a second or collateral security, will not, at law, discharge the surety from the payment

- of the principal debt; although he might have been discharged had the creditor dealt with the principal in the same manner, with respect to the original security. *Schroepfel v. Shaw*, 580
14. A surety seeking to be relieved from the payment of a debt on the ground of the creditor's delay in enforcing collateral securities must establish the fact that he has lost the benefit of such securities by some act of the creditor inconsistent with his rights as surety, and not by any act or default of his own. *ib*
 15. A surety will not be discharged by the delay of the creditor in the prosecution of the principal debtor, or mere inaction on his part in the collection of collateral securities, unaccompanied by an actual binding agreement with the principal for delay, or by fraud, or wilful neglect. *ib*
 16. In order to effect the discharge of a surety on the ground of delay in proceeding against the principal, it must be shown that there was a valid agreement, upon a sufficient consideration, to forbear and give time for payment. *ib*
 17. From such an agreement the law presumes injury to the surety, and holds him discharged, irrespective of actual damage. *ib*
- See BANKRUPT, &c. 3.
DEBTOR AND CREDITOR, 2.
SHERIFF, 1, 3.

R

RAIL-ROADS.

1. An action on the case lies against a rail-road company for a nuisance, in running their cars and engines, ringing bells, blowing off steam, and making other noises in the neighborhood of a church, or meeting house, on the sabbath, and during public worship, which so annoy and molest the congregation worshipping there as greatly to depreciate the value of the house, and render the same unfit for a place of religious worship. *First Baptist Church in Schenectady v. The Schenectady and Troy Rail-Road Co.* 79
2. An action for such an injury is properly brought in the name of the church, in its corporate capacity, and need not be brought by the individuals affected thereby. *ib*
3. And it is properly brought against the rail-road company, as a corporation, instead of against its agents, who caused the noises to be made. *ib*
4. In an action on the case against a rail-road company, to recover damages for injuries sustained in consequence of their negligently running their train of cars against the plaintiff's wagon, while he was crossing the rail-road track, in order to warrant a recovery, it must appear that the defendants' agents were guilty of negligence, and that the plaintiff was himself free from negligence or fault. *Spencer v. The Utica and Schenectady Rail-Road Company*, 337

RECOGNIZANCE.

1. A recognizance, taken in pursuance of an order of an officer authorized to let to bail, and by an officer having general jurisdiction to let to bail, and to take recognizances, though he be not the officer before whom the application to let to bail is pending, is valid; especially where the officer acquires jurisdiction of the person of the party, by his voluntary appearance and acknowledgment, and where the officer before whom the application is pending subsequently adopts the recognizance thus taken, and lets the prisoner to bail on the faith of it, and the recognizance itself is filed by him, and becomes a record. *People v. Leggett*, 360
2. A recognizance taken from the prosecutor of a criminal complaint before a police justice, containing the condition required by the statute, that the prosecutor will appear and testify at the next court having cognizance of the offence, &c. will not be vitiated by the addition of the words "as well to the grand as the petit jury, and not depart the said court without leave." *People v. Millis*, 511
3. Where the condition of a recognizance taken before a police justice is to do an act for which a recognizance may properly be taken, and the police justice had authority, in law, to

act in cases of that general description, a declaration upon such recognizance need not aver the existence of the particular facts and circumstances which gave the officer authority to take it. *ib*

REFEREES.

Where evidence is introduced, on a hearing before referees, upon a question of fact, and the referees come to a conclusion thereon, a new trial will not be granted on account of the incorrectness of their conclusion; whatever may be the opinion of the court upon that point. *Spencer v. The Utica and Sch'y R. R. Co.* 337

See REPORT OF REFEREES.

RELEASE.

A release of one of two or more joint debtors, whether they are bound jointly or jointly and severally, discharges the original contract as to all; and may be pleaded in bar of an action on the contract. But the release, to have this effect, must be a technical release under seal. *Frink v. Green.* 455

See COVENANT, 3.

REPLEVIN.

Where, in an action of replevin, there is proof tending to show that a part of the goods replevied does not belong to the plaintiff but to another person, the judge should charge the jury that if they find that any part of the goods belongs to a third person the defendant is entitled to a verdict for the value of those goods. *Morris v. Stone.* 516

REPORT OF REFEREES.

1. If there is any evidence, upon a question of fact, on a hearing before referees, the report of the referees will not be disturbed on account of the decision made by them upon that ques-

tion, whatever may be the opinion of the court as to the weight of such evidence. *Camp v. Pulver,* 91

2. The report of a referee is like the verdict of a jury. It is conclusive, upon questions of fact, where there is no decided preponderance of the evidence in favor of the party against whom it is made. *Quackenbush v. Ehle,* 469

See REFEREES.

ROSSIE GALENA COMPANY.

- J. was one of the original stockholders of the Rossie Galena Company, and at the time of contracting a debt to the plaintiffs, by the company, there had been no transfer, on its books, of the stock which had been owned by J., although he had, in fact, sold it, and had transferred his certificate of stock, with his name endorsed upon it in blank; Held that J. was liable to the plaintiffs as a stockholder, under the act of incorporation of the company. *Worrall v. Judson,* 210

S

SALE.

See AGREEMENT, 13.
BAILMENT.
SHERIFF, 14, 15.

SALVAGE.

See JURISDICTION, 1, 2.

SEDUCTION.

1. The right to maintain an action on the case, for seduction, depends upon the relation of master and servant between the plaintiff and the person seduced; not on that of parent and child. And it seems courts will not look beyond the relations which actually exist, for the purpose of inquiring by what right they are sustained. *Egersoll v. Jones,* 661

2. Where, in an action for seduction it appeared that the person seduced had a mother living, but her father she had not heard from in fourteen years and supposed him dead; that she had lived in the plaintiff's family most of the time since she was seven years old, and the plaintiff had taken her to bring up; that she was treated by him like one of his own children, and worked for him as they did, and was supported, clothed, and educated by him, and taken care of by him during her sickness, and he paid the expenses of her lying-in; *Held*, that for the purpose of prosecuting the suit, the plaintiff stood in loco parentis to her, and that he could maintain the action; although at the time of the seduction she was at service in another family, with the plaintiff's assent. *ib*

3. Exemplary damages may always be allowed in actions on the case for seduction; whether the suit be brought by the parent of the person seduced, or by a person suing as master who is not also her parent. *ib*

4. In such an action, where it appears that at the time the seduction occurred, the person seduced was at service in another family, it is not improper for the judge to submit it to the jury to determine, whether the plaintiff was at that time entitled to the wages of the person seduced. *ib*

5. In an action for seduction the defendant cannot be allowed to prove, in mitigation of damages, that he has offered to marry the girl seduced. *ib*

SET-OFF.

1. A judgment will not be ordered to be set off against another, on motion, unless it is a judgment which is conclusive upon the defendant therein, and which the plaintiff has a clear right to enforce. *Harris v. Palmer*, 105

2. The subject matter of the set-off must be clear and indisputable, and conclusive upon the party, and must have passed the ordeal of a judicial determination, in a case where the court had acquired jurisdiction of the party, either by his appearance, or by personal service of process upon him. *ib*

SHERIFF.

1. The sureties of a sheriff are liable on his official bond only for acts done *virtute officii*, and not for those committed *colore officii*. They are not accountable for a trespass committed by the sheriff in taking property not directed to be taken by process. *People v. Schuyler*, 166

2. As to such an act, the sheriff has no protection from his process; and it does not change the character of the wrong that he committed *colore officii*. He stands in the same position as if he had acted without process. *ib*

3. The sureties in a sheriff's bond are not liable for a trespass committed by the sheriff in seizing the goods of a third person, upon an attachment issued against the property of an absconding debtor, and for refusing to deliver such goods to the claimant after a jury have found the property to be in him, and the attaching creditor has executed a bond of indemnity to the sheriff. *ib*

4. The duty of sheriffs is the same on attachments that it is on executions. In both cases the sheriff is bound to keep possession of the property, if indemnified, although the jury may have found the title to be in a third person. *ib*

5. In order to justify a sheriff in discharging a prisoner in pursuance of an order of a judge, made for that purpose, the subject matter of the order must appear to be within the jurisdiction of the judge; and it must be the precise order which the statute authorized him to make. *Bust v. Pettibone*, 273

6. In such case if the order is regular on its face, and such as the judge has power to grant, for the guidance of the sheriff, the latter may justify by the order alone; without showing that all the preliminary steps prescribed by law, to give jurisdiction, had been taken. *ib*

7. But where the officer claims to justify by the order alone, it should in itself cover the whole ground, and show enough to constitute a complete defence. *ib*

8. An officer, in making a distress for rent, under a landlord's warrant, does not act in the capacity of a public officer, but as a private bailiff of the landlord; and the landlord is, in effect, the distrainer. *Moulton v. Norton*, 286
9. A sheriff, therefore, is not responsible for the acts of his deputies, in serving distress warrants. *ib*
10. A joint action cannot be maintained against a sheriff and his deputy, for the acts of the deputy. *ib*
11. In order to give a sheriff a cause of action upon the official bond of his deputy, there must not only be a technical breach of duty, on the part of the deputy, but such a breach of duty as to occasion pecuniary damage to the plaintiff. *Rowe v. Richardson*, 385
12. The bail of a deputy sheriff are only responsible for his official acts as a general deputy. They are not liable for a want of courtesy on the part of the deputy, towards his principal, nor for an act which may be annoying, or even troublesome to the sheriff, so long as his conduct is strictly in accordance with his duty as a public officer. *ib*
13. A sheriff cannot maintain an action upon the bond of his deputy, for the act of the latter in levying upon, and selling, under and by virtue of a junior execution, property upon which the sheriff had previously levied, by virtue of a prior execution against the same defendant. *ib*
14. If a sheriff, having two executions against the same person, sells on the junior one, the sale is valid. But the sheriff is bound to pay over the proceeds of the sale to the plaintiff in the prior execution. *ib*
15. And if the sale is made by a deputy of the sheriff, and he refuses to apply the proceeds upon the prior execution, or to pay them over to the sheriff, to be thus applied by him, such refusal is a breach of the condition of the deputy's official bond; the liability of the sheriff being a legal consequence of the default of such deputy. *ib*

SHERIFF'S DEED.

See EXECUTION, 5.

SHERIFF'S SALE.

See EXECUTION.¹
SHERIFF, 14, 15.

SLANDER.

See DISCOVERY.

SLANDER OF TITLE.

1. To support an action for slander of title, special damages must be alleged, and that too, circumstantially. An allegation of loss, in general terms, is not sufficient. *Bailey v. Dean*, 297
2. To sustain an action for slander of title, or for malicious prosecution, there must be a want of probable cause. If what the defendant says, or does, is in pursuance of a claim of title, he is not responsible. *ib*

STATUTES.

1. Although it is a fundamental rule that every law must be construed according to the intention of the makers, that intention is never resorted to for any other purpose than to ascertain what they in fact intended to do, and not for the purpose of ascertaining what they have done. *Per EDWARDS, J. Leavitt v. Blatchford*, 9
2. As a primary rule in the construction of statutes, the intention is to be collected from the words; but when the words are not explicit, it is to be gathered from the occasion and necessity for the law, the defect of the former law, and the designed remedy; being the causes which moved the legislature to enact it. *Pillow v. Bushnell*, 156
3. Upon every sound principle of construction a reference to a term used in a statute must be in its direct and primary sense as expressly defined, and not in an assimilated interpretation. And this rule is more especially applicable when the express meaning will accomplish all that was designed by the framers of the law. *Per STRONG, P. J. Cruger v. Cruger*, 296

See BANKS, Sec. 1, 6, 8.
CONSTITUTIONAL LAW.
LUNATIC ASYLUM.
TRUSTS AND TRUSTEES, 10.

SUBROGATION.

The doctrine of subrogation is a doctrine which prevails only in equity; and it applies only to lawful and meritorious transactions. *The Farmers' Loan and Trust Co. v. Carroll*, 613

SUBSCRIBING WITNESS.

See DEED.

SURROGATE.

1. A decree of the surrogate, made on the final settlement of the accounts of executors, is no bar to a suit by creditors who were not parties to the proceeding before the surrogate, and upon whom no citation was served. *Elwood v. Deifendorf*, 398
2. A surrogate may order the bond of an executor or administrator to be prosecuted, for a refusal or omission of the executor or administrator to perform a decree made by such surrogate, without any previous service upon the executor or administrator, of a copy of the decree, or a citation to appear and show cause why an order for the prosecution of such bond should not be made. *People v. Rowland*, 449
3. If the surrogate is satisfied that there has been either a refusal or an omission, on the part of the executor or administrator, to perform a decree made against him for rendering an account, or upon a final settlement, or for the payment of a debt, legacy, or distributive share, he is authorized to make an order for the prosecution of the bond of such executor or administrator without any proof of a demand of the money directed by the decree to be paid. *ib*

T

TRESPASS.

1. Where, in an action of trespass *quare clausum fregit*, the plaintiff complains

not only of injury done to his land, but that his dwelling house was also destroyed, and the cause is tried upon a plea of title, and there is a verdict against the defendants, the plaintiff cannot, on a writ of error, insist that the dwelling house was personal property, and that trespass would lie against the defendants, for its destruction. *Houghtaling v. Houghtaling*, 379

2. In such case the gist of the action is the injury to the land; the additional allegation that the plaintiff's dwelling house was destroyed, being merely matter of aggravation. And unless the evidence sustains the charge of injury to the land, the plaintiff is not entitled to recover. *ib*

See WASTE.

TRUSTS AND TRUSTEES.

1. On the 8th of December, 1834, F. being indebted to H. in the sum of \$330, and to A. M. in the sum of \$69, conveyed to the latter a farm of 100 acres owned by him in fee, subject to an annual rent payable to Mrs. L. At the date of this conveyance the Tanners' Bank held a note against F. for \$100, which A. M. was liable to pay, as endorser. On the 23d of January, 1835, F. conveyed to H. and A. M., jointly, a piece of land containing 38 acres, which was also subject to an annual rent, payable to Mrs. L. H. and A. M. entered into the joint possession of both lots, and for several years received and divided between themselves, the income thereof. On the 26th of April, 1845, A. M. and H. purchased of Mrs. L. her interest in the rents chargeable on the lots, for the sum of \$374.11, each paying one half, and received from her a deed of the premises. On the 31st of December, 1846, A. M. conveyed to D. S. M. his interest in the premises, and for the consideration, received from D. S. M. his note for \$600 payable in April, 1851, secured by a mortgage on the premises. A. M. afterwards assigned the note and mortgage to N. H. as security for liabilities previously incurred by N. H. for A. M. On a bill by H. against A. M. and his wife, D. S. M. and his wife, and N. H., claiming that the plaintiff's interest in the land bore the same proportion to that of A. M. as their respective debts bore to each other; and praying that

- the plaintiff's interest in the premises, and in the note and mortgage, might be declared; that the premises might be sold and the proceeds divided among the parties in proportion to their respective rights therein; and that A. M. might be decreed to account for the rents and profits, &c.; it being established by the proof that the deed from F. to A. M., though executed without the knowledge of H., was in fact executed for the joint benefit of H. and A. M.; and that after its execution H., on being informed of the giving of the deed assented to it, and agreed to pay, and did pay the half of the note to the Tanners' Bank, as a part of the consideration; and that D. S. M. and N. H. had notice of the plaintiff's rights. *Held* that the plaintiff was entitled to a decree establishing the trust in respect to the undivided half of the 100 acres conveyed by F. to A. M., and declaring that D. S. M. took his conveyance of the land, subject to the trust in favor of H.; and that the mortgage executed by him, to secure the purchase money, was only a lien upon the half of the premises held by D. S. M. in his own right. And the decree directed D. S. M. and wife, to release to the plaintiff his share of the premises, and that the widow of A. M. (who had died) should join in the release. *Hosford v. Merwin*, 51
2. *Held also*, that the plaintiff was entitled to a decree for a partition of the premises, and to a reference to take and state an account between him and the administrators of A. M. as to the rents and profits of the premises, and as to the disbursements on account of the land previous to the conveyance by A. M. to D. S. M.; and to a similar account between the plaintiff and D. S. M. subsequent to such conveyance. And the decree directed the payment of any balance which should be found due to either party, upon such accounting. *ib*
3. *Held further*, that the trust was the ordinary case of a trust created by one person for the benefit of another, without his knowledge, and accepted by the *cestui que trust* upon being notified thereof. And that such a trust was not prohibited by the statute. (1 R. S. 728, § 51.) *ib*
4. *Also held*, that the deed which H. and A. M. took jointly from Mrs. L. on the 26th of April, 1845, operated as a merger of their previous interests in the premises; and that under that deed they held the land as tenants in common. *ib*
5. Trusts, in a deed of real estate, by which it is provided that the grantors, while of sufficient capacity, and afterwards their families, shall remain in possession, and continue in the perception and occupation of the rents and profits, are void under the provisions of the revised statutes respecting uses and trusts, if the trustees are not authorized to receive the rents and profits; notwithstanding they are required to take care that the rents and profits shall be properly applied. *Jarvis v. Babcock*, 139
6. To render a trust as to the rents and profits of real estate valid, it is not only necessary that the trustee should be authorized to receive the rents and profits, but that he should be also empowered to apply the same. *ib*
7. A trust, in a deed of real estate, declaring that upon the death of J. the trustees shall hold the premises granted, for the use of the wife and children of J. living at the time of his death, and to the issue of such as shall then be dead, in the manner, upon the terms, and subject to the charges mentioned, declared, and appointed in and by the last will and testament of J., but not authorizing the trustees to take possession or to receive the rents and profits, nor imposing any active duty on the trustees, is a mere formal trust; and no estate, legal or equitable, is vested in the trustees, under such deed. *ib*
8. Nor will any estate pass, under such a trust, to the persons for whose use the property is directed to be held; the deed being void, as to them, for uncertainty. *ib*
9. A trust in a deed, providing that upon the death of J. C. the trustees shall hold one half of the premises granted, to and for the use of W., his heirs and assigns forever, and the other half to and for the use of F., H. and C., their heirs and assigns forever, subject to certain charges; and declaring that in case the persons named, or any of them, should be dead before and at the death of the grantor, then such lapsed share or portion should go to the lawful issue, then living, of such deceased person, and if there was no

such issue, then such share or portion to go to the right heirs of the grantor, is void for uncertainty. *ib*

10. The 63d section of the statute of uses and trusts, respecting trusts for the receipt of the rents and profits of lands, ought not to be extended by the courts, because of the *analogy*, to trusts of personal property. *Per McCoun, J. Arnold v. Gilbert*, 190

11. The nature and properties of trusts considered and discussed. *The Farmers' Loan and Trust Company v. Carroll*, 613

12. Distinction between an *estate* in trust and a *power* in trust. *ib*

See ADVANCEMENT.

U

UNDUE INFLUENCE.

See DEED, 5, 6.

USURY.

1. A purchaser of mortgaged premises from the mortgagor, who takes the same subject to the lien and payment of the mortgage, acquires the equity of redemption merely, and cannot set up the defence of usury, on a bill to foreclose such mortgage. *Morris v. Floyd*, 130
2. And where a junior mortgagee purchased in the mortgaged premises at a sale under a statutory foreclosure of the junior mortgage, and sold them to another for the same amount at which they were purchased by him, and conveyed them to the purchaser by a warranty deed, subject to the prior mortgage; *Held* that unless there was something in the surrounding circumstances to warrant a different conclusion, it must be intended that the grantor meant to convey, and the grantee to receive, a title subject to the payment of the prior mortgage, by the grantee; and that, in a suit to foreclose such mortgage, the grantee could not set up usury in such mortgage, as a defence. *ib*
3. The principle upon which the defence of usury is denied to one who has pur-

chased the mortgaged premises, from the mortgagor, subject to the mortgage, is founded upon the supposition that on the purchase an allowance was made, out of the purchase money, with which to redeem the property purchased, from the incumbrance; and that the purchaser ought not, under such circumstances, to avail himself of a statute not intended for his benefit. *Per H. GRAY, P. J. ib*

4. If, in such a case, the premises are worth any considerable amount less than the consideration expressed in the deed and the sum due on the mortgage subject to which they were conveyed, that fact, in connection with the circumstance that the grantor was not the mortgagor, and not benefited by the original loan, might afford ground for believing that the payment of the prior mortgage, by the purchaser, was not contemplated at the time of the sale and purchase. But if the premises are amply sufficient, over and above all they cost the purchaser, to pay the prior mortgage, that fact will go to show that it was the intention of the parties that the property should be conveyed subject to the payment of the mortgage. *Per H. GRAY, P. J. ib*

5. Where a company, upon an application made to it by a borrower, for a loan, issues its certificates payable at a future time, and bearing an interest of *five* per cent, and takes from the borrower an agreement to repay the amount of the certificates, with interest at *seven* per cent, the transaction is *usurious per se*, or *usurious* upon its face. *The Farmers' Loan and Trust Co. v. Carroll*, 613
6. In all cases of a loan, where it appears, upon the face of the transaction, that the lender is in any manner to receive more than the legal rate of interest, as a compensation for forbearance upon the thing loaned, whatever the thing may be, it is *usury per se*. *Per WELLES, J. ib*
7. Where a transaction is void for usury, no one who has been connected with the transaction, or who stands chargeable with notice, is entitled to any benefit from any thing connected with, or growing out of it. *Per WELLES, J. ib*

See AGREEMENT, 1, 2, 5 to 12.
CASES OVERRULED, &c,

V

VARIANCE.

See NUISANCE, 3.

VENDOR AND PURCHASER.

1. If a contract of sale is void for the fraud of the vendor, the purchaser may maintain an action to recover the value of property delivered in part performance of it. *Camp v. Pulter*, 91
2. In such a case, the property being wrongfully obtained, the purchaser may maintain trover for it, or, waiving the tort, he may maintain an action of assumpsit to recover the value of the property. *ib*
3. Upon the trial of such an action it is proper to show the circumstances under which the goods came into the defendant's possession; and for that purpose, to prove the contract, and the delivery of the goods in performance of it, and then to give evidence of the fraud upon which the plaintiff relies to avoid the contract. *ib*
4. To sustain an action to recover the consideration paid by the plaintiff upon the purchase of land, on the ground of fraud in the vendor, it must satisfactorily appear that the defendant, in making the contract of sale misrepresented some material fact affecting his title, or that he intentionally concealed some such fact from the knowledge of the purchaser. *ib*
5. If there is any evidence showing such misrepresentation, or concealment, a report of referees will not be disturbed upon that ground, whatever may be the opinion of the court as to the weight of such evidence. *Per HARRIS, P. J.* *ib*
6. If the identity of trees growing upon land contracted to be sold, with a covenant by the purchaser against cutting timber, can be traced into lumber, and the contract of purchase has not been performed by the payment of the purchase price, the title to the property continues in the vendor; and he may reclaim it in its altered state, either

from the vendee of the land, or from a person claiming title to the lumber under him. *Pierrepoint v. Barnard*, 364

7. The cases in which a vendee is allowed to recover back money paid on a contract for the purchase of real estate, where the contract has been rescinded, are, 1st, where the rescission is voluntary, and by the mutual consent of both parties, and without the default or wrong of either; 2d, where the vendor is incapable or unwilling to perform the contract on his part; or 3d, where the vendor has been guilty of fraud in making the contract. *Per WELLES, J. Battle v. The Rochester City Bank*, 414
8. In either of these cases, it would be against equity and conscience for the vendor to retain the money; and the law implies a promise, on his part, to refund it. *Per WELLES, J.* *ib*
9. But where the vendor has, in all respects, performed his contract, and the rescission is entirely in consequence of the unexcused default of the vendee, in making further payments, the latter cannot recover back the money paid by him. *ib*

See BONA FIDE PURCHASER.
DEED, 6, 7.

VERDICT.

Where there is a conflict of evidence, upon a trial in a justice's court, the verdict of the jury, so far as questions of fact are concerned, is conclusive, and cannot be reviewed, on writ of error, however much the verdict may be against the weight of evidence. *McDonald v. Edgerton*, 560

VOLUNTARY CONVEYANCES.

Voluntary conveyances are effectual as between the parties, and cannot be set aside by the grantor, although he afterwards becomes dissatisfied with the transaction. *Prosser v. McIntyre*, 494

W

WAIVER.

See FORFEITURE.

WARRANT.

1. A warrant issued by a justice for the arrest of a person charged with larceny, which recites a distinct charge of larceny against the accused, is not rendered invalid by the omission of an allegation as to the value of the property stolen. *Payne v. Barnes*, 465
2. The only effect of such an omission is, that the offence charged will be deemed to be petit instead of grand larceny, and a magistrate of the county in which the person accused is arrested, will be authorized to admit him to bail. *ib*
3. All the statute requires is that the warrant shall recite the accusation. And the accusation need only charge that a criminal offence has been committed. If therefore, it charges a criminal offence generally, viz. that of larceny, it is sufficient to authorize the issuing of a warrant, although the accusation omits to state the value of the property. *ib*
4. The recital in such warrant, of the complaint, is presumptive evidence of the fact that such complaint has been made. *ib*
5. An omission in a warrant of arrest, which is merely clerical, and is apparent, and which does not mislead any one, or prejudice the defendant, will not render such warrant invalid. *ib*

WARRANTY.

1. Where a party sells and assigns to another a perpetual lease of lands, and in part payment of the consideration agreed to be paid by the assignee, receives from him a deed of a piece of land, with covenants of warranty, *it seems* that the assignor, upon a failure of title to the land covered by the deed, cannot bring an action against the assignee to recover that part of the consideration for which

the land was received in payment. *Moyer v. Shoemaker*, 319

2. It is a general rule that where there is an open contract of warranty, the remedy of the party must be confined to that. *Per GRIDLEY, J.* *ib*

WASTE.

1. A court of equity will interfere to prevent injury to land, even where the title is in dispute, and the right is doubtful, if the waste or trespass will be attended by irreparable mischief, or if, from the irresponsibility of the defendant, or otherwise, the plaintiff cannot obtain relief at law. *Spear v. Cutter*, 486
2. A court of equity will not sustain an injunction bill, filed merely to prevent the removal of timber wrongfully cut, or for an account for waste already committed; as the plaintiff has an ample remedy at law, for such injury. *ib*
3. But where the bill is filed to prevent future waste, and also to prevent the removal of timber already cut, or for an account for waste already committed, the court, to avoid a multiplicity of suits, will allow an account and satisfaction for what has been done; and where the mischief to the plaintiff will be irreparable, will also enjoin the defendant from removing the timber he has cut. *ib*

WILL.

1. A testator, by his will executed in August, 1838, devised to his widow the use, rent and income of his dwelling house during life, or widowhood, and \$1500 a year which he charged on certain parts of his real estate. He devised to John and William, sons of his son Moses, two houses and lots in C. street during their joint lives, and if either should die without issue then to the survivor, for life. Upon the death of either or both leaving issue, then to such issue, and their heirs and assigns forever, so much of the said houses and lots as their father had a life estate in, while living. Upon the death of both, only one leaving issue, then both houses in fee to such issue. But in case of the death of both without issue, then a

devise over to his children George, Mary, Sarah and Charles. To G. and J., sons of his son John, he devised two other houses and lots, with remainders limited over in the same manner. To his four children, George, Mary, Sarah and Charles, he devised four houses and lots in fee; but neither was to have possession until a year after the widow's death or marriage. The executors were authorized to rent and lease houses and lands, to make repairs, to pay taxes and assessments, to effect insurance, and to cause all surplus moneys over the uses specified in the will, to be paid to four of the testator's children. And the testator devised the residue of his estate to four of his children and to their heirs, and the survivor, if any of them should die without issue. By a codicil, the testator afterwards revoked the devises to C., one of his four children, and devised all that portion of his estate to his son George, in trust to receive his share of the personal estate and the rents of the real estate, and apply the same to C.'s use during life; and upon his death, leaving children, in trust to convey said share in fee to such children; and in case of his death without children, then to convey in fee to C.'s heirs at law. On a bill by the children of the testator's son John, to set aside the will, on the ground that it created unlawful trusts, and suspended the power of alienation to an extent not warranted by law; *Held* that the remainders over to George, in trust for C. for life, in the houses and lots devised to John and William, and to G. and J., were void. That the testator died intestate as to the rents and profits of the houses and lots devised to George in his own right and as trustee for C., to Mary, Sarah, John and William, and to J. and G. from the testator's death till the expiration of one year after the widow's death or marriage. And that all the residue of the will and codicil were legal and valid. *Tucker v. Tucker.*

99

2. How far the failure of part of a will creating a trust estate, by reason of the illegality of a portion of the trusts, affects other parts confessedly legal. *ib*

3. A testator, by his will, devised as follows: "The remainder of the wood land I also give of lot No. 4 to my grand-daughter Maria S. of my

daughter J. forty acres of woodland taken off and the remainder supposed to be twenty-five acres of wood land I also bequeath to my grand-daughter of my son George, Maria and Catharine included Maria S. Maria V. E., Catharine V. E. my grand-daughters I gave the above mentioned to them their heirs and assigns forever." On a petition by Maria S. for a partition of the twenty-five acres of wood land, claiming one-third part thereof; under the will; *Held* that the remainder of the wood lot, after taking out the 40 acres first devised to Maria S. was devised to Maria V. E. and Catharine V. E., and that Maria S. took no part thereof. *Van Allen v. Mooers,* 110

4. Whether an adjective shall refer exclusively to the last preceding antecedent, or may refer also to one or more, further back, depends upon the intent of the writer. *ib*

5. Where a testator, by his will, mentioned several *particular* purposes for which he authorized sales of his real estate to be made, viz. the payment of debts, and certain specified legacies, and then the residue of his estate, real and personal, was devised to the executors in trust, and they were expressly directed and required to sell the same for the *general* purpose of dividing it into shares of sevenths, and distributing such shares among the children and grandchildren of the testator; *Held* that although the *particular* purposes of the will might only require a partial conversion of the realty into personalty, yet that the *general* object and scope of the will rendered it evident that sales of the whole real estate were intended, for the general purposes of the will; and that this amounted to a conversion of the same into personalty, to all intents; and that the beneficiaries took the same as personal property. *Arnold v. Gilbert,* 190

6. *Held* also that the fact that no time was fixed, within which sales were to be made, and that it was left to the discretion of the executors to effect sales from time to time *when*, and in the best *manner* they could, did not alter the case; their duty, in regard to effecting sales, being as imperative as though the testator had specified a time within which sales should be made and the whole estate divided. *ib*

7. Where no time is specified for the performance of such a trust, a *reasonable*

time will be allowed; and should it be unreasonably delayed, a court of equity will interfere, and compel a performance. *ib*

8. Where a testator, after directing the sale of all his real estate, by his executors, for the general purposes of his will, gives the executors ample powers to lease lots for terms of years, to insure, rebuild and repair houses, and to sell, purchase and exchange gores, strips, or pieces of land, the granting of such powers to them will not be deemed as interfering with the paramount duty of selling the real estate, according to the ultimate design and object of the will. Until the real estate can all be sold, the power to manage it to the best advantage may be exercised, and is not inconsistent with the obligation to sell. *ib*

9. A testator, by his will, gave to his wife, for life, in lieu of dower, a third of the net rents of his real estate, so long as it should remain unsold. At her death this third was to be divided into equal sevenths, one-seventh being given to each of the testator's sons, G., D. and C., absolutely, and one-seventh to E. F. for life, or so long as she should remain single, and at her death or marriage, to her children or next of kin absolutely, as in case of intestacy. *Held* that these were all valid gifts; that the bequest to E. F. would vest an absolute ownership in her personal representatives at her death, (if it did not sooner vest in her children, by her re-marriage;) and that her death would be but the termination of a second life estate in so much of the fund. *ib*

10. By the same will the interest of one other seventh of the capital set apart for the use of the widow was given to Mrs. H. during life, or while she remained single; and at her death, or re-marriage, the principal of her share was to revert and become a part of the residuary estate of the testator to be divided into six parts between his five sons and E. F., his daughter, she to take her sixth of this seventh in the same manner as she took her original one-seventh; the limitation being the same. And the sons, G., D. and C., each took his sixth of Mrs. H.'s seventh absolutely. By the 19th section of the will the original seventh of the capital, and one-sixth of Mrs. H.'s seventh, given to two other sons, George and W., were placed in trust

for investment, and the interest only was to be paid to them respectively, during their lives, and the remainder to their children; but in the event of either, or both, dying without children then living, their shares were to fall back into the estate, to be again divided equally between the sons, G., D. and C., and whichever of George and W. should survive the other. And to the survivor the interest was limited for life, and the principal was to be divided after his death, in the manner directed in respect to his original seventh part. *Held* that the effect of the 19th section of the will, so far as George and W.'s shares of the estate generally were concerned, was to give to them, by way of cross-remainders, a contingent interest for life in each other's shares; a contingency depending on the event of either dying without children living at the time of his death, and therefore operating in law to prevent the vesting of an absolute ownership in their respective shares, at their deaths, both as to their original sevenths and as to their sixths of the seventh given in the first instance to Mrs. H. *ib*

11. *Held also*, that the vesting of an absolute ownership in their original sevenths was not thereby postponed beyond two lives, nor was it so postponed in their sixths of Mrs. H.'s seventh, except in her seventh of the one-third set apart in the first instance to the widow's use. That in that one-third there was first a life estate in her, then a remainder for life in one-seventh of the third to Mrs. H., and then a remainder over of a sixth of that one-seventh to each of the sons, George and W., but not so limited as to vest in either of them an absolute ownership, on the death of Mrs. H. And that the limitations in favor of their children as purchasers, or takers in their own right, or to the children of the survivor, and in case none were living at their decease, then to others, were too remote, and of no effect in law. *ib*

12. A testator, by his will, after giving to several persons legacies of \$100 each, bequeathed to his brother J. the amount of a certain bond and mortgage, and of two promissory notes, given by J. to the testator. He then gave to J. H. C., S. B. and C. P. legacies of \$100 each, and to J. C. a legacy of \$300. The testator then made "the above legacies," excepting that

portion devised to his brother J., a lien upon his real estate; which said real estate he directed his executors to sell, and from the proceeds thereof to pay "said legacies." And in case of a surplus from the sale, after paying all claims thereon, and the legacies, then he directed that "all the legacies before mentioned" should be proportionably increased, and in case of a deficiency, that then and in that case "the said legacies" should be proportionably diminished. *Held*, that by the words "all the legacies before mentioned" the testator meant all the legacies before mentioned as being liens upon, and as being entitled to be paid out of the avails of the real estate devoted by the will to that purpose. *Sholl v. Sholl*, 312

13. *Held also*, that so far as the testator's brother J. was concerned, the testator merely meant to forgive the debt owing by him; and that it was not the intention of the will that he should share any part of the proceeds of the sale of the real estate. *ib*

14. Where a testator, by his will, devised as follows: "It is my will and order that my beloved wife L. shall be *master of my estate*, both real and personal, so long as she remains my widow, subject to the payment of the different legacies out of the same hereafter mentioned to be paid;" and then followed bequests of certain legacies to the children of the testator; a devise of all the real estate the testator might die seized of, to his son J. J. B. and to his heirs and assigns forever; and a bequest unto all his children, share and share alike, of the residue of his personal estate to be divided after the widowhood of his wife should cease; and his wife was appointed sole executrix, and guardian of the testator's infant children; *Held*, that it was the intention of the testator to give his wife the use of his entire estate, (subject to the payment of the legacies,) during her widowhood; and that by consequence she took a life estate in

the premises, subject to be defeated by her marriage; there being nothing in the will to *control or overrule*, that construction. *Beardslee v. Beardslee*, 324

15. A devise in a will executed previous to the revised statutes, of land to trustees, in trust to permit M. so long as she shall live, or during the minority of her youngest child, to enjoy the rents and profits of the land, for her benefit and the maintenance of the children, and directing that after M.'s death or the arrival of the youngest child at the age of 21, the lands shall be sold or divided equally between M. and the testator's then surviving children, is not void as being an illegal suspension of the power of alienation. *Stewart v. McMartin*, 438

WITNESS.

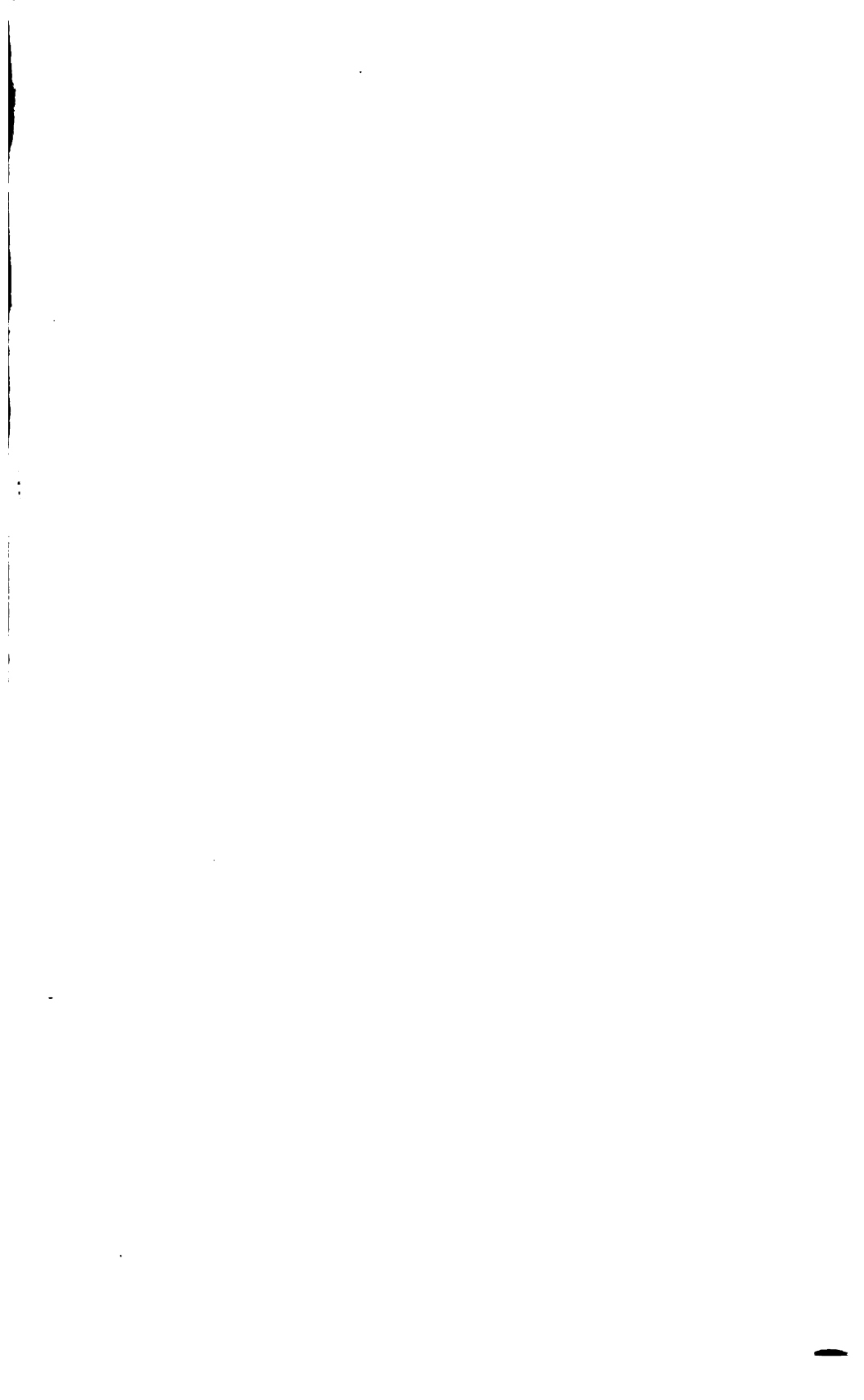
1. In an action for an assault and battery on the wife, brought by the husband and wife as plaintiffs, the defendant cannot require the wife to testify as a witness, either under the act of 1847 or under section 344 of the code of procedure. *Pillow v. Bushnell*, 156
2. The only disqualification designed to be removed by the statute was that of being a party to the record. It was not intended to change the common law rule which declared the wife incompetent to testify as a witness either for or against her husband. *ib*
3. A person incompetent to testify, from any cause, cannot be made a competent witness under the statute by being made a party to the record. *ib*

WORK AND LABOR.

See AGREEMENT, 17, 18.
PARENT AND CHILD.

END OF VOLUME FIVE.

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